No. 16-980	
Title:	**Jon Husted, Ohio Secretary of State, Petitioner** **v.** **A. Philip Randolph Institute, et al.**
Docketed:	February 8, 2017
Linked with 16A556	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(16-3746)
Decision Date:	September 23, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Dec 02 2016	Application (16A556) to extend the time to file a petition for a writ of certiorari from December 22, 2016 to February 6, 2017, submitted to Justice Kagan.
Dec 06 2016	Application (16A556) granted by Justice Kagan extending the time to file until February 6, 2017.
Feb 03 2017	Petition for a writ of certiorari filed. (Response due March 10, 2017)
Feb 03 2017	Appendix of Jon Husted, Ohio Secretary of State filed.
Feb 27 2017	Order extending time to file response to petition to and including March 31, 2017.
Mar 09 2017	Brief amici curiae of Former Attorneys of the Civil Rights Division of the United States Department of Justice filed.
Mar 10 2017	Brief amicus curiae of Landmark Legal Foundation filed.
Mar 10 2017	Brief amicus curiae of Judicial Watch, Inc. filed.
Mar 10 2017	Brief amici curiae of Georgia and 14 other States filed.
Mar 31 2017	Brief of respondents A. Philip Randolph Institute, et al. in opposition filed.

Apr 17 2017	Reply of petitioner Jon Husted, Ohio Secretary of State filed.
Apr 19 2017	DISTRIBUTED for Conference of May 11, 2017.
May 10 2017	Rescheduled.
May 15 2017	DISTRIBUTED for Conference of May 18, 2017.
May 22 2017	DISTRIBUTED for Conference of May 25, 2017.
May 30 2017	Petition GRANTED.
Jun 07 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner.
Jun 07 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Respondents.
Jun 22 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 31, 2017.
Jun 22 2017	The time to file respondents' brief on the merits is extended to and including September 15, 2017.
Jun 29 2017	Motion to dispense with printing the joint appendix filed by the parties.
Jul 31 2017	Brief of petitioner Husted, Ohio Secretary of State filed.
Aug 07 2017	Brief amicus curiae of United States filed.
Aug 07 2017	Brief amicus curiae of Buckeye Institute filed.
Aug 07 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Aug 07 2017	Brief amici curiae of Georgia and 16 Other States filed.
Aug 07 2017	Brief amicus curiae of Judicial Watch, Inc. filed.
Aug 07 2017	Brief amicus curiae of American Civil Rights Union filed.

Aug 07 2017	Brief amici curiae of Former Attorneys of the Civil Rights Division of the United States Department of Justice filed.
Aug 07 2017	Brief amici curiae of Landmark Legal Foundation, et al. filed.
Aug 07 2017	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Aug 22 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 25 2017	Motion to dispense with printing the joint appendix filed by the parties GRANTED.
Aug 31 2017	SET FOR ARGUMENT on Wednesday November 8, 2017
Sep 07 2017	CIRCULATED
Sep 12 2017	Record requested from the U.S.C.A. 6th Circuit.
Sep 15 2017	Brief of respondents A. Philip Randolph Institute, et al. filed. (Distributed)
Sep 19 2017	Brief amici curiae of Libertarian Party of Ohio, et al. filed. (Distributed)
Sep 22 2017	Brief amici curiae of Constitutional Accountability Center filed. (Distributed)
Sep 22 2017	Brief amicus curiae of American History Professors filed. (Distributed)
Sep 22 2017	Brief amicus curiae of Libertarian National Committee filed. (Distributed)
Sep 22 2017	Brief amici curiae of the League of Women Voters of the United States, et al. filed. (Distributed)
Sep 22 2017	Brief amici curiae of National Association for the Advancement of Colored People, et al. filed. (Distributed)
Sep 22 2017	Brief amicus curiae of Senator Sherrod Brown filed. (Distributed)
Sep 22 2017	Brief amici curiae of Certain Members of the Congressional Black Caucus filed. (Distributed)
Sep 22 2017	Brief amici curiae of National Disability Rights Network, et al. filed. (Distributed)

Sep 22 2017	Brief amicus curiae of Common Cause filed. (Distributed)
Sep 22 2017	Brief amici curiae of Eric H. Holder, Jr., et al. filed. (Distributed)
Sep 22 2017	Brief amici curiae of the States of New York, et al. filed. (Distributed)
Sep 22 2017	Brief amici curiae of Asian Americans Advancing Justice | AAJC, et al. filed. (Distributed)
Sep 22 2017	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Sep 22 2017	Brief amici curiae of Current and Former Ohio Elections Officials filed. (Distributed)
Sep 22 2017	Brief amicus curiae of VoteVets Action Fund filed. (Distributed)
Sep 22 2017	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Sep 22 2017	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed. (Distributed)
Oct 10 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 16 2017	Reply of petitioner Jon Husted, Ohio Secretary of State filed. (Distributed)
Oct 27 2017	Letter from counsel for respondents relating to oral argument filed.
Oct 27 2017	This case is removed from the oral argument calendar for November 8, 2017.
Nov 17 2017	SET FOR ARGUMENT ON Wednesday, January 10, 2018
Nov 22 2017	CIRCULATED.
Dec 18 2017	Record received from the U.S.C.A. 6th Circuit is electronic.
Jan 10 2018	Argued. For petitioner: Eric E. Murphy, State Solicitor for State of Ohio, Columbus, Ohio; and Noel J. Francisco, Solicitor General, Department of

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RECORD AND BRIEFS

16-980

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SUPREME COURT, U.S.

No. 16-___

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE,
NORTHEAST OHIO COALITION FOR THE HOMELESS,
AND LARRY HARMON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case considers the steps that States may take to maintain accurate voter-registration lists under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). These laws bar States from removing "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote," but clarify that a State must remove a voter if the voter does not respond to a confirmation notice sent by the State and does not vote in the next two general federal elections. 52 U.S.C. §§ 20507(b)(2), 21083(a)(4)(A).

Since 1994, as part of its general list-maintenance program, Ohio has sent voters who lack voter activity over a two-year period the confirmation notice that the NVRA and HAVA both reference. If these voters do not respond to that notice and do not engage in any additional voter activity over the next four years (including two more federal elections), Ohio removes them from the list of registered voters and requires them to reregister if they otherwise remain eligible to vote. The Sixth Circuit held that this decades-old process violates § 20507(b)(2) because Ohio uses a voter's failure to vote as the "trigger" for sending a confirmation notice to that voter.

The question presented is:

Does 52 U.S.C. § 20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below (and Respondents here) are Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon.

Defendant-Appellee below (and Petitioner here) is Ohio Secretary of State Jon Husted.

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National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, originally codified at 42 U.S.C. §§ 1973gg to 1973gg-10, now codified at 52 U.S.C. §§ 20501-20511 ..... *passim*

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Md. Code Ann., Elec. § 3-20 (1993) 3

Mich. Comp. Laws Ann. § 168.509 (Westlaw through 1992 Regular Sess.) 3

Mich. Comp. Laws Ann. § 168.513 (Westlaw through 1992 Regular Sess.) 3

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Mont. Code Ann. § 13-2-220(1)(c)(iii) 17

Mont. Code Ann. § 13-2-401 (Westlaw through 1993 Regular Sess.) 3

Mont. Code Ann. § 13-2-402(7) 17

N.C. Gen. Stat. Ann. § 163-82.14(a) 18

N.C. Gen. Stat. § 163-69 (1993) 3

N.J. Stat. Ann. § 19:31-5 (Westlaw through 1992 First Annual Sess.) 3, 4

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N.Y. Elec. Law § 5-406 (Westlaw through 1992 ch. 848) 3

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Okla. Stat. Ann. tit. 26, § 4-120.2 (Westlaw through 1992 Second Regular Sess.) 3

Okla. Stat. Ann. tit. 26, § 4-120.2(A)(6), (B) 18

25 Pa. Cons. Stat. Ann. § 1901(b)(3), (d) 18

25 Pa. Stat. Ann. § 623-40 (Westlaw through 1993 Regular Sess.) 3

25 Pa. Stat. Ann. § 951-38 (Westlaw through 1993 Regular Sess.) 3

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Utah Code Ann. § 20-2-24 (1987) 3

Va. Code Ann. § 24.1-59 (1990) 3

Vt. Stat. Ann. tit. 17, § 2150 (Westlaw through 1993 Sess.) 3

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Wis. Stat. Ann. § 6.50 (Westlaw through 1993 Wis. Act 15) 4

Wyo. Stat. Ann. § 22-3-115 (1991) 4

Other Authorities

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 27

Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 10 (Sept. 2005) 15, 17

138 Cong. Rec. 11,689 (1992) 31

148 Cong. Rec. 20,834 (2002) 16, 17

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Joseph P. Harris, Nat'l Mun. League, *A Model Registration System* 11 (2d ed. 1931) 2, 3, 16

Joseph P. Harris, *Registration of Voters in the United States* 4-5 (1929) ..... *passim*

Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001) 2, 15

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OPINIONS BELOW

The Sixth Circuit's decision, Pet. App. 1a-37a, is reported at 838 F.3d 699. The district court's decision, Pet. App. 39a-70a, is unreported, but available at 2016 WL 3542450. Its decision on remand, Pet. App. 71a-100a, is also unreported, but available at 2016 WL 6093371.

JURISDICTION

On September 23, 2016, the Sixth Circuit issued its decision. Justice Kagan granted a 45-day extension to file this petition until February 6, 2017. The petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The National Voter Registration Act of 1993 (NVRA) was codified at 42 U.S.C. §§ 1973gg to 1973gg-10, but is now codified at 52 U.S.C. §§ 20501-20511. The Help America Vote Act of 2002 (HAVA) was codified at 42 U.S.C. §§ 15301-15545, but is now codified at 52 U.S.C. §§ 20901-21145. This petition's appendix includes 52 U.S.C. §§ 20507 and 21083.

STATEMENT OF THE CASE

A. Historically, Most States Relied On Voter Inactivity To Help Maintain Accurate Voter-Registration Lists

1. At the founding, States did not require voters to register. "In the early days, when the bulk of the population lived in rural communities, when almost every voter was personally known to his neighbors, and when there was comparatively little movement of population from one locality to another, the problem of determining those who were entitled to vote in

a given election district was comparatively simple." Joseph P. Harris, *Registration of Voters in the United States* 4-5 (1929) ("Harris"). Registration was "a more modern innovation, adopted in most states as a good government reform, especially for the growing cities, in the years after the Civil War." Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001), *available at* goo.gl/CjONlS.

Early registration laws shared common traits. They often did not apply throughout the State, instead centering on populated cities. Joseph P. Harris, Nat'l Mun. League, *A Model Registration System* 11 (2d ed. 1931) ("Nat'l Mun. League"). They often did not create permanent lists, instead requiring voters to *reregister* regularly. Nat'l Comm'n on Fed. Election Reform, *supra*, at 28. And they often were challenged as improperly adding a "registration" qualification to the exclusive list of voting qualifications in state constitutions. Courts split over that constitutional question. *Compare Morris v. Powell*, 25 N.E. 221 (Ind. 1890), *with State v. Butts*, 2 P. 618 (Kan. 1884). But many States ultimately passed amendments allowing registration, Harris, *supra*, at 305, and this constitutional debate "largely closed" by the 1930s, Nat'l Mun. League, *supra*, at 9.

About that time, "[t]he next wave of reform in voter registration concentrated on replacing periodic registration with permanent registration, to reduce costs and the opportunity for fraud." Nat'l Comm'n on Fed. Election Reform, *supra*, at 28. When switching to *permanent* registration, States simultaneously passed laws requiring the removal of voters who had not voted over a certain time in order to help main-

tain accurate voter lists. Harris, *supra*, at 224-27. The National Municipal League also recommended using nonvoting as part of its model system. Nat'l Mun. League, *supra*, at 38-39.

By the time Congress passed the NVRA, most States required or permitted officials to remove voters if they had not voted over a certain time. S. Rep. No. 103-6, at 46 (1993).[1] A few removed voters for

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[1] Alaska Stat. § 15.07.130 (1993); Ark. Const. amend. 51 § 11(a)(1) (1991); Colo. Rev. Stat. Ann. § 1-2-224 (Westlaw through 1993 First Regular Sess.); Del. Code Ann. tit. 15, § 1704 (1990); Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.); Ga. Code Ann. § 21-2-231 (1993); Haw. Rev. Stat. § 11-17 (1993); Idaho Code Ann. § 34-435 (1993); 10 Ill. Comp. Stat. Ann. 5/4-17, 5/5-24, 5/6-58 (Westlaw through 1993 Regular Sess.); Ind. Code Ann. §§ 3-7-9-1, 3-7-9-2, 3-7-9-3, 3-7-9-5 (Westlaw through 1993 First Regular and First Special Sess.); Iowa Code Ann. § 48.31 (Westlaw through 1992 Regular Sess. and First and Second Special Sess.); Md. Code Ann., Elec. § 3-20 (1993); Mich. Comp. Laws Ann. §§ 168.509, 168.513 (Westlaw through 1992 Regular Sess.); Minn. Stat. Ann. § 201.171 (Westlaw through 1992 Regular Sess.); Miss. Code Ann. § 23-15-159 (Westlaw through 1993 Regular Sess.); Mont. Code Ann. § 13-2-401 (Westlaw through 1993 Regular Sess.); Nev. Rev. Stat. Ann. § 293.540 (Westlaw through 1993 Regular Sess.); N.J. Stat. Ann. § 19:31-5 (Westlaw through 1992 First Annual Sess.); N.M. Stat. Ann. § 1-4-28 (1993); N.Y. Elec. Law § 5-406 (Westlaw through 1992 ch. 848); N.C. Gen. Stat. § 163-69 (1993); Ohio Rev. Code Ann. § 3503.21 (Westlaw through Jan. 1, 1993); Okla. Stat. Ann. tit. 26, § 4-120.2 (Westlaw through 1992 Second Regular Sess.); 25 Pa. Stat. Ann. §§ 623-40, 951-38 (Westlaw through 1993 Regular Sess.); R.I. Gen. Laws § 17-10-1 (1993); S.C. Code Ann. § 7-3-20 (Westlaw through 1993 Regular Sess.); S.D. Codified Laws § 12-4-19 (1993); Tenn. Code Ann. § 2-2-106 (1993); Utah Code Ann. § 20-2-24 (1987); Vt. Stat. Ann. tit. 17, § 2150 (Westlaw through 1993 Sess.); Va. Code Ann. § 24.1-59 (1990); Wash. Rev. Code Ann. § 29.10.080 (Westlaw through 1992 Sess.); W. Va. Code

nonvoting *alone*. *E.g.*, N.J. Stat. Ann. § 19:31-5 (Westlaw through 1992 First Annual Sess.). Most required officials to *notify* voters and give them a chance to remain registered. *E.g.*, Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.).

These failure-to-vote laws, too, were challenged as adding a "voting" qualification to the list of constitutional qualifications. Courts divided on that question as well. *Compare Duprey v. Anderson*, 518 P.2d 807 (Colo. 1974); *Simms v. Cnty. Ct. of Kanawha Cty.*, 61 S.E.2d 849 (W. Va. 1950), *with Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214 (Md. 2003); *Mich. State UAW Cmty. Action Program Council v. Austin*, 198 N.W.2d 385 (Mich. 1972).

2. Ohio's history followed these trends. An 1885 law required *all voters* in *certain cities* to register before *every* election, with registration open seven days. 82 Ohio Laws 232, 232-34 (1885). Challengers attacked the law as violating Article V, Section 1 of the Ohio Constitution, which sets voting qualifications. *Daggett v. Hudson*, 3 N.E. 538, 539 (Ohio 1885). The Ohio Supreme Court upheld the legislature's power to pass registration laws, recognizing registration as "efficacious to prevent fraud." *Id.* at 540-41. But the court concluded that the narrow registration window violated Article V, Section 1. *Id.* at 545-46. After expanding registration options, 83 Ohio Laws 209, 216 (1886), Ohio later required voters in large cities to register annually, and voters in small cities to register every four years, Ohio Gen. Code §§ 4871-72 (1926).

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§ 3-2-3 (1989); Wis. Stat. Ann. § 6.50 (Westlaw through 1993 Wis. Act 15); Wyo. Stat. Ann. § 22-3-115 (1991).

In 1929, Ohio adopted its first *permanent* registration system for cities. 113 Ohio Laws 307, 322 (1929). This law cancelled the registration of voters who did not vote during any two-year period. *Id.* at 332. Boards of elections would send voters "a printed postcard notice of that fact," instructing them that they must reregister. *Id.* By 1977, Ohio mandated this permanent system statewide. 137 Ohio Laws 305, 314 (1977).

That year, Ohio's legislature eliminated the rule removing voters for nonvoting. *Id.* at 305. In response, Ohio's citizens amended their constitution to require that "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Ohio Const. art. V, § 1. Before the NVRA, therefore, boards would "cancel the registration" of voters who had neither "voted at least once in the four" prior years nor updated their registration during that time. 144 Ohio Laws 5517, 5526 (1992). Thirty days before, they sent notices to voters about the impending cancellation. *Id.*

B. Congress Passed The NVRA And HAVA To Increase Total Registration But Decrease Inaccuracies In The Rolls

In recent decades, Congress has regulated elections under two constitutional provisions—the first applicable to all elections, the second to federal ones.

The first provision, the Fifteenth Amendment, permits Congress to enforce its command against racial voting discrimination. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013). It is a tragic fact of history that, before 1965, some States enacted registra-

tion rules to "deny registration" to African Americans rather than ensure fair elections. Harris, *supra*, at 157. Congress passed the Voting Rights Act to remedy this "extraordinary" problem. *Shelby Cnty.*, 133 S. Ct. at 2618. Section 2 bars States from using any practice in any election that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

The second provision, the "Elections Clause," directs state "Legislature[s]" to set the "Times, Places and Manner of holding" *federal* congressional elections, but allows Congress to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Historically, Congress left these regulations to States. *United States v. Gradwell*, 243 U.S. 476, 485 (1917). With the NVRA and HAVA, however, it "erected a complex superstructure of federal regulation atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013).

1. *NVRA*. The NVRA served competing goals. It sought to "increase the number of eligible citizens who register to vote" in federal elections. 52 U.S.C. § 20501(b)(1). But it also sought to "protect the integrity of the electoral process" by ensuring "accurate" registration lists. *Id.* § 20501(b)(3)-(4).

To advance its first purpose, the NVRA required "States to provide simplified systems for registering" in federal elections. *Young v. Fordice*, 520 U.S. 273, 275 (1997). It compelled States to allow registration through motor-vehicle departments, the mail, and various public offices. 52 U.S.C. §§ 20504-20506. It also required States to leave registration open up to 30 days before federal elections, *id.* § 20507(a)(1),

and limited their ability to remove names from the registration lists for those elections, *id.* § 20507(a)(3).

To advance its second purpose, the NVRA required States to keep accurate voter lists. Four provisions are especially relevant. *First*, § 20507(a)(4)—the "Maintenance Duty"—directed States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" a voter's death or change of residence.

Second, § 20507(b) imposed two limits on maintenance efforts. Section 20507(b)(1) required a program to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act." Section 20507(b)(2)—the "Failure-To-Vote Clause"—limited the removal of individuals for nonvoting. It originally indicated that a program could "not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 83.

Third, § 20507(d)—the "Confirmation Procedure"—outlined a process by which States could cancel a registration because a voter may have moved. It provided: "A State shall not remove the name of a registrant" from a registration list "on the ground that the registrant has changed residence unless the registrant" *both* (1) "has failed to respond to a notice" sent by the State, *and* (2) has not thereafter "voted or appeared to vote" in two general federal elections. 52 U.S.C. § 20507(d)(1). The notice must be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his

or her current address." *Id.* § 20507(d)(2). It also must include certain information. *Id.*

Fourth, the NVRA neither expressly required nor expressly barred States from sending these notices to particular voters. Yet § 20507(c)(1)—the "Safe-Harbor Provision"—identified a group to whom States could send the notices to meet their Maintenance Duty. This provision noted that a State "may meet" its Maintenance Duty by using "change-of-address information supplied by the Postal Service" to identify voters who have moved. *Id.* § 20507(c)(1)(A). The State should send notices to these voters and remove them through the Confirmation Procedure. *Id.* § 20507(c)(1)(B)(ii).

2. *HAVA.* After the NVRA, some States sent notices, under the Confirmation Procedure, to those lacking voter activity. *E.g.*, Colo. Rev. Stat. § 1-2-605 (1997). In the 1990s, the United States asserted that this process violated the Failure-To-Vote Clause, but conceded that "[t]he issue of whether or not election officials may target the forwardable confirmation notices *solely* for failure to vote . . . remains a question of the legal interpretation of NVRA provisions." Office of Election Admin., FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, 5-22 (Mar. 1998). HAVA made two changes affecting that legal question.

Change One: HAVA required States to keep a "single, uniform, official, centralized, interactive computerized statewide voter registration list." 52 U.S.C. § 21083(a)(1)(A). It *mandated* that voters "who have not responded to a notice *and* who have not voted in 2 consecutive general elections for Fed-

eral office" be removed from this list. *Id.* § 21083(a)(4)(A) (emphasis added). But it clarified that "no registrant may be removed *solely* by reason of a failure to vote." *Id.* (emphasis added).

Change Two: HAVA included a section entitled "clarification of ability of election officials to remove registrations from official list of voters on grounds of change of residence." Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728 (capitalizations omitted). This provision added a disclaimer to the Failure-To-Vote Clause, 52 U.S.C. § 20507(b)(2):

> except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

116 Stat. at 1728.

C. Since 1994, Ohio Has Conducted Two General List-Maintenance Processes

In 1994, Ohio's legislature directed the Secretary of State to "prescribe a general program to remove ineligible voters." 145 Ohio Laws 2516, 2521 (1994) (amending Ohio Rev. Code § 3501.05(Q)). The Secretary adopted two processes that have been in place ever since, spanning Secretaries from both political

parties. Damschroder Decl., R.38-2, PageID#294; Taft Directive 94-36, R.38-1, PageID#286.

The first process, contemplated by the Safe-Harbor Provision, uses the postal service's change-of-address data. The postal service's database "contains the names and addresses of individuals who have filed changes of address with the United States Postal Service." Damschroder Decl., R. 38-2, PageID#294. The Secretary compares that database with Ohio's registration database to identify individuals who may have moved. It sends matches to boards of elections so that they may mail confirmation notices to these voters. *Id.* If a voter does not respond to this notice or engage in voter activity for four years from the date the board mails it, the board cancels the registration. Yet this process misses voters who move *without* telling the postal service. *Id.*

Ohio thus uses a "Supplemental Process." *Id.* It "seeks to identify electors whose *lack of voter activity* indicates they may have moved, even though their names did not appear" in the change-of-address database. Brunner Directive 2009-05, R.38-7, PageID#401. Boards send confirmation notices to voters who have not engaged in voter activity for two years. Damschroder Decl., R.38-2, PageID#295. If a voter returns the notice through prepaid mail or responds through the internet, a board updates the voter's information. *Id.*, PageID#295-96. If a voter ignores the notice and then fails to vote or update a registration over the next four years, the board cancels the registration. *Id.* All told, this process removes individuals who *both* fail to respond to a notice *and* fail to engage in voter activity for six years.

Until 2014, Ohio conducted these processes biennially. It now conducts them annually after a legislative change and a lawsuit challenging Ohio's maintenance efforts. Ohio Rev. Code § 3503.21(D); Settlement Agreement in *Judicial Watch v. Husted*, No. 2:12-cv-792 (S.D. Ohio), R.38-4, PageID#370.

D. A District Court Dismissed Plaintiffs' Suit Against The Supplemental Process, But The Sixth Circuit Reversed

1. In 2016, Ohio A. Philip Randolph Institute, the Northeast Ohio Coalition for the Homeless, and Larry Harmon ("Plaintiffs") sued the Secretary under 28 U.S.C. § 1331. They asserted that: (1) Ohio's Supplemental Process violated the NVRA, and (2) Ohio's confirmation notices lacked required information. Am. Compl., R.37, PageID#236-38. In an effort to compromise, the Secretary updated the contents of the notices and the website allowing registrants to confirm addresses. Confirmation Notice, R.56-2, PageID#22821-24.

The district court thereafter entered final judgment for the Secretary. Pet. App. 39-40a n.1. On Count 1, it held that the Failure-To-Vote Clause's "unambiguous text" (when read with HAVA's amendment) "specifically permits" the Supplemental Process. Pet. App. 59a. The district court also rebuffed Plaintiffs' other arguments why the process violated the NVRA. Pet. App. 59a-64a.

On Count 2, the court ruled that Plaintiffs' claim was largely mooted by the Secretary's changes to the notice. Pet. App. 66a-67a. As to Plaintiffs' sole contention that was not moot—that a notice must contain information about how to register in other

States—the court held that the NVRA did not include such a mandate. Pet. App. 68a.

2. A divided Sixth Circuit reversed.

Supplemental Process. The majority held that Ohio's Supplemental Process violated the Failure-To-Vote Clause. Pet. App. 10a-24a. It divided its analysis into two questions: Did HAVA's amendment to that clause expressly permit that process? If not, did the clause otherwise prohibit it? Pet. App. 14a.

On the first question, the court ruled that HAVA did not insulate the Supplemental Process. Pet. App. 14a-20a. While HAVA authorized Ohio to remove voters who neither responded to a notice nor voted in two elections, the court reasoned, the Supplemental Process tied the *initial* sending of that notice to failure to vote. Pet. App. 15a. Nothing in HAVA, the court suggested, permitted Ohio to use nonvoting as such a "trigger." Pet. App. 15a-20a. The court also read HAVA strictly based on the principle that "exceptions to a statute's general rules be construed narrowly." Pet. App. 16a.

On the second question, the court held that using voter inactivity as a "trigger" to send notices violated the Failure-To-Vote Clause because it "'*result*[*ed*]' in removal by reason of failure to vote." Pet. App. 21a-24a. "Under the ordinary meaning of 'result,'" the court stated, "the Supplemental Process would violate [this] clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." Pet. App. 21a (citation omitted). And while HAVA clarified that States were barred only from removing voters "solely" for nonvoting, the court

held that the Supplemental Process did so. Pet. App. 22a.

Notice. The majority next held that the Secretary failed to prove that the challenge to Ohio's old notice was moot. Pet. App. 25a-28a. And it held that Ohio's new notice violated a provision requiring notices to include "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). The majority read this provision as requiring a notice to contain some information about out-of-state registration. Pet. App. 29a-31a.

Dissent. Judge Siler determined that "Ohio ha[d] developed a lawful procedure." Pet. App. 32a. But he wrote a "condensed" dissent, which did "not reflect the extent to which [he] disagree[d] with the majority," to give this Court time before the 2016 election to consider this case. *Id.* He concluded that the Supplemental Process comported with the Failure-To-Vote Clause because Ohio did not remove voters *solely* for nonvoting. Pet. App. 32a-35a.

3. Despite Judge Siler's invitation to seek emergency relief, the Secretary believed that, in this case, setting the "rules about the administration of the impending election [was] more important than further emergency litigation." Response Br., 6th Cir. R.41, at 2 (Sept. 30, 2016). The Secretary thus opted not to seek en banc review, *id.*, and agreed to a preliminary injunction for 2016 requiring boards generally to count the provisional ballots of voters whose registrations were cancelled under the Supplemental Process in 2011, 2013, or 2015. Pet. App. 95a.

Before the 2016 election, a Plaintiff suggested that "hundreds of thousands" of voters had been re-

moved under the Supplemental Process in 2015 and that "1.2 million" may have been removed since 2011. *Amicus* Br. of Ohio A. Philip Randolph Inst. at 7, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 14 (2016) (No. 16A405). Yet about 7,515 ballots were cast during this election under the district court's provisional remedy (out of more than 150,000 provisional ballots cast statewide). Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, *available at* https://goo.gl/KSZnCS.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED RAISES AN IMPORTANT ISSUE THAT REQUIRES THE COURT'S IMMEDIATE ATTENTION

The Court should grant certiorari because the question presented raises an important election-integrity issue that could affect many States. This petition also gives the Court a good vehicle to answer the question outside the context of emergency litigation before an election.

A. The Question Presented Addresses An Important Election-Integrity Matter

The Sixth Circuit's decision makes it harder for States to conduct what all can agree is a critical activity—removing ineligible voters from registration lists—by eliminating one method for doing so.

1. States have "important interest[s] in accurate voter lists." *Marston v. Lewis*, 410 U.S. 679, 681 (1973). For over a century, "[t]he requirement that all voters shall be registered prior to the day of the election" has been seen as "one of the most important safeguards of the purity of the ballot box." Harris, *supra*, at 4. Before Philadelphia required registra-

tion in 1906, for example, "it was a common saying that all of the signers of the Declaration of Independence . . . still regularly voted in that city." *Id.* at 6. Today, the "maintenance of accurate and up-to-date voter registration lists" remains "the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18; Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 10 (Sept. 2005) ("*Building Confidence*"), *available at* https://goo.gl/KFsw1N.

A commission co-chaired by Presidents Ford and Carter explained the concerns with inaccurate rolls. "[I]naccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit 'repeaters' to use such available names." Nat'l Comm'n on Fed. Election Reform, *supra*, at 27. "For generations these practices have been among the oldest and most frequently practiced forms of vote fraud." *Id.* When rejecting challenges to laws permitting the removal of voters for nonvoting, courts have likewise found it "well established" that the laws are "a legitimate means by which the State can attempt to prevent voter fraud." *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994). "Without removing names, there exists the very real danger that impostors will claim to be someone on the list and vote in their places." *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991); *Williams v. Osser*, 350 F. Supp. 646, 652-53 (E.D. Pa. 1972).

Relatedly, bloated rolls filled with ineligible voters undermine public faith in the outcome of elections. "[P]ublic confidence in the integrity of the electoral process has independent significance, be-

cause it encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J., op.). Yet inaccurate lists could breed a *perception* of fraud, and "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Thus, a State's concerns with voter perception and confidence justify list-maintenance efforts even if fraud is rare.

2. Despite the importance of maintaining accurate lists, States have long struggled to do so. When permanent lists became common in the 1900s, the National Municipal League recognized that maintenance efforts were "the weakest part of existing systems," so it recommended using nonvoting as one component for removing so-called "dead wood." Nat'l Mun. League, *supra*, at 18, 37-38. By the early 1990s, Congress likewise imposed the Maintenance Duty to cure the ongoing problem of outdated registrations "accumulat[ing] on the rolls." S. Rep. 103-6, at 46; *cf. The Need for Further Federal Action in the Area of Criminal Vote Fraud: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 6 (1983) (Statement of Daniel Webb, U.S. Attorney for the Northern District of Illinois) (estimating, after an investigation of a Chicago election, that voter fraud amounted to about "10 percent or 100,000 [fraudulent] votes").

If anything, however, the NVRA's strict removal limits exacerbated the difficulties in maintaining the rolls. By 2002, HAVA's authors "found that voter rolls across the country [were] inaccurate or in very poor order." 148 Cong. Rec. 20,834 (2002). "[T]he

condition in many jurisdictions, particularly the large jurisdictions, [was] in a state of crisis. Voter lists [were] swollen with the names of people who [were] no longer eligible to vote in that jurisdiction, [were] deceased or [were] disqualified from voting for another reason." *Id.* Even after HAVA, "the number of registered voters [continued to be] greater than the number of voting-aged citizens" in many places. *Building Confidence*, *supra*, at 22.

This remains an issue. In 2012, one study estimated that about 24 million registrations were "no longer valid" or "significantly inaccurate." The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade* (Feb. 2012), R.38-10, PageID#495. The study added that more than 1.8 million deceased voters were registered, and about 2.76 million people had registrations in more than one State. *Id.* Similarly, the United States has sued over inaccurate lists. It sued Missouri, for example, because "the registered voters in numerous Missouri counties exceeded the number of eligible voters." *United States v. Missouri*, 535 F.3d 844, 847 (8th Cir. 2008); *see also Crawford*, 553 U.S. at 196 (Stevens, J., op.) (describing suit against Indiana).

B. The Question Presented Affects Many States

As the district court found, Ohio is not alone in using voter inactivity as part of its maintenance program. Pet. App. 58a n.5. Many state laws *expressly* permit or require officials to send notices to voters who have not voted over a certain time. Ga. Code Ann. §§ 21-2-234, 21-2-235; 10 Ill. Comp. Stat. 5/4-17, 5/5-24, 5/6-58; Iowa Code § 48A.28(2)(b); Mont.

Code Ann. §§ 13-2-220(1)(c)(iii), 13-2-402(7); Okla. Stat. Ann. tit. 26, § 4-120.2(A)(6), (B); 25 Pa. Cons. Stat. Ann. § 1901(b)(3), (d); Tenn. Code Ann. § 2-2-106(c); W. Va. Code Ann. § 3-2-25(j); *cf.* Cal. Elec. Code §§ 2224-2226; Haw. Rev. Stat. Ann. § 11-17.

In addition, the Sixth Circuit's logic—which prohibits a voter's failure to vote from being a but-for cause of the voter's removal—implicates States that use voter inactivity in related ways. Under some state laws, officials are allowed or required to send voters who have not voted a *nonforwardable* mailing, and to follow up with a confirmation notice for those voters whose nonforwardable mailing is returned as undeliverable. Alaska Stat. Ann. § 15.07.130(a)-(b); Fla. Stat. Ann. § 98.065(2)(c); Mo. Stat. §§ 115.181(2), 115.193; 17 R.I. Gen. Laws Ann. § 17-9.1-27(b); S.D. Codified Laws § 12-4-19; *cf.* Kan. Stat. Ann. § 25-2354(a) (permitting targeted mailings). A voter removed through this process would not have received a mailing *but for* the failure to vote, so the voter's removal could be viewed as "'proceed[ing] or [arising] as a consequence'" of nonvoting under the Sixth Circuit's reasoning. Pet. App. 21a (citation omitted).

Finally, like Ohio Rev. Code § 3501.05(Q), other state laws delegate to officials the task of determining who should receive notices. Some direct officials to determine the list-maintenance "methods." *E.g.*, N.C. Gen. Stat. Ann. § 163-82.14(a); Nev. Rev. Stat. Ann. § 293.530(1). Others allow officials to send notices to those that they have "reason to believe" have moved. *E.g.*, Ark. Const. amend. 51, §§ 10(d)-(e), 11(a)(1); Ky. Stat. § 116.112(3); La. Rev. Stat. 18:193(A); Tex. Elec. Code Ann. § 15.051(a). Still others merely direct officials to follow the Confirma-

tion Procedure *without* listing any triggers for sending confirmation notices. *E.g.*, Miss. Code Ann. § 23-15-153(1); S.C. Code Ann. § 7-5-330(F)(1). In some of these States, officials may have previously relied on nonvoting to send notices. *E.g.*, S.C. State Elections Comm'n, *SEC Sends Notice to Inactive Voters* (May 6, 2009), https://www.scvotes.org/node/181; Nev. Sec'y of State, Election Frequently Asked Questions, http://nvsos.gov/sos/elections/election-resources/faqs#453. If this Court upholds Ohio's process, these States could do so in the future.

All told, the Sixth Circuit's logic either directly affects or has the potential to affect many States.

C. The Question Presented Requires The Court's Attention Now, And This Case Offers A Good Vehicle To Answer It

1. The Court should grant certiorari now because conflicting litigation has left the States with little margin for error. The NVRA permits private parties to sue (and seek attorney's fees) for alleged violations. 52 U.S.C. § 20510(b)-(c). Yet the NVRA's dueling purposes have generated contradictory suits tugging the States at both ends. This Court's answer to the question presented would offer important guidance on the steps that States may take to avoid the competing legal pitfalls (and their associated costs).

On one hand, States (or local governments) have been sued by parties claiming that they have violated their Maintenance Duty by insufficiently maintaining registration lists. Another Ohio suit illustrates this point. In 2012, parties challenged Ohio's maintenance efforts by identifying, among other things, three counties in which the number of regis-

tered voters exceeded the voting-age population. Ohio settled that suit by agreeing to conduct its now-challenged Supplemental Process *annually*. Settlement Agreement in *Judicial Watch v. Husted*, No. 2:12-cv-792 (S.D. Ohio), R.38-4, PageID#370.

Ohio is not alone in this regard. As noted, the United States has sued governments that have insufficiently maintained registration lists. Most relevant here, in 2007, the United States entered into a settlement with Philadelphia that required that city to do what the United States claimed below is illegal: "send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner . . . ." Settlement Agreement at 10, in *United States v. City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa.) (available at U.S. Br., 6th Cir. R.29, Attach. 11). Counties in Texas and Mississippi, too, have entered into consent decrees with private parties that required them to send notices based on voter inactivity. One such decree required a county to send notices "[t]o any voter who may be currently classified as inactive by virtue of not voting in two consecutive federal election cycles." Consent Decree at 6, in *ACLU v. McDonald*, No. 2:14-cv-12 (W.D. Tex.) (available at Ex. 4 to *Amicus* Br. of Public Interest Legal Foundation, R.50-5, PageID#22596).

On the other hand, States have been sued by those arguing that these efforts themselves violate the NVRA. This suit is Exhibit A. It claims that the settlement that Ohio entered into to meet its Maintenance Duty itself violates the Failure-To-Vote Clause. Other States have also been sued regarding their use of nonvoting. *E.g.*, *Common Cause v.*

Kemp, No. 1:16-cv-452 (N.D. Ga.); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1223-24 (N.D. Ill. 1995); Office of Election Admin., *supra*, at 5-22 to 5-23. And similar suits may only increase if the Court allows the decision below to stand. *E.g.*, Letter from Stuart C. Naifeh, Senior Counsel, Demos, to Hon. Tre Hargett, Tenn. Sec'y of State (Oct. 20, 2016), *available at* http://www.demos.org/publication/tn-notice-letter-compliance-nvra-section-8.

In short, suits brought against States (including a suit by the United States) have *required* what the Sixth Circuit (and the United States) said below was *prohibited*. The Court should not leave the States with this diametrically conflicting guidance.

2. This case provides a good vehicle to resolve the question. All too many elections cases arise in an emergency posture that requires quick decisionmaking ill-suited for general guidance. *Purcell*, 549 U.S. at 4-5. Here, however, Ohio purposely declined to seek emergency relief before the 2016 election. As a result, the Court may decide this important question outside the shadow of an election. That timing is ideal. On an election's eve, by contrast, "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.*

If anything, timing is more important for this question than it is for others given the complicated remedy. The district court's order on remand illustrates as much. Finding "itself in a difficult position," the court recognized the conundrum of crafting a remedy that registers as many individuals as possible "without placing an undue burden on election

officials, fundamentally changing the State's voting processes, or making room for abuse of those same processes." Pet. App. 75a. All are better off with an answer now, so other States do not find themselves in the same predicament near an election.

II. The Sixth Circuit's Decision Conflicts With This Court's Cases

The Court should grant certiorari because the decision below conflicts with this Court's cases.

A. The Sixth Circuit's Textual Analysis Violated Two Interpretive Principles

The Sixth Circuit reasoned that the word "'result'" in the Failure-To-Vote Clause means "'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (citation omitted). Under that definition, it continued, "the Supplemental Process would violate [this] clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.* (citation omitted). This reading conflicts with the Court's cases in two ways: (1) it interprets the clause as adopting a boundless causation test, and (2) it renders HAVA's amendments meaningless.

1. The Court has held that "by reason of" or similar statutory phrases delineating a causal relationship create two requirements. They initially require *but-for* or *factual* causation—"an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'" *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citation omitted). Yet "[l]ife is too short to pursue every event to its most remote, 'but-for,' consequences." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment). So these

statutes incorporate *proximate* causation as well. *Paroline*, 134 S. Ct. at 1719-21; *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-35 (1983). And proximate causation includes "generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

Holmes offers a good example. The Racketeer Influenced and Corrupt Organizations Act (RICO) allows parties to sue for injuries arising *by reason of* RICO violations. *Id.* at 265. The year before the NVRA was enacted, this Court read "by reason of" to incorporate proximate causation. *Id.* at 266-67. The Court added that a "direct relation" must exist between the "injury asserted" and the "conduct" alleged. *Id.* at 268. "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]'" does not suffice. *Hemi*, 559 U.S. at 9 (citation omitted).

The Sixth Circuit disregarded these principles. It asked *only* whether failure to vote was a *factual* cause of removal. Pet. App. 21a. The court nowhere placed other limits on the connection between failure to vote and removal. Yet it should have incorporated proximate-causation principles. Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes*, 503 U.S. at 268.

Under the Supplemental Process, moreover, no "direct relation" exists between nonvoting and removal because of an intermediate step—a voter's own failure to respond to a notice. That makes any link between failure to vote and removal "indirect,"

as it is "purely contingent" on the voter's inaction. Put another way, the Supplemental Process does not remove voters "by reason of" their *failure to vote*; it removes voters "by reason of" their *failure to respond to a notice*.

The Confirmation Procedure compels this reading. It *requires* States to use failure to vote. If a voter does not respond to a notice, the State may remove the voter only if the voter does not vote in the next two elections. 52 U.S.C. § 20507(d)(1)(B)(ii). Thus, a voter's removal will—by definition—always "'proceed[] or arise[] as a consequence' of his or her failure to vote." Pet. App. 21a (citation omitted). If the Sixth Circuit correctly interpreted the Failure-To-Vote Clause, that clause *bars* what the Confirmation Procedure *allows*.

2. When "'Congress acts to amend a statute,'" this Court also "'presume[s] it intends its amendment to have real and substantial effect.'" *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) (citation omitted). That is, the Court will not read amendments in a way that renders them "a largely meaningless exercise." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 57-58 (2006).

The Sixth Circuit disregarded these principles by rendering HAVA's amendments meaningless. In the 1990s, the United States claimed that the Failure-To-Vote Clause barred States from sending notices for nonvoting, but conceded that the issue "remain[ed] a question of the legal interpretation of NVRA provisions." Office of Election Admin., *supra*, at 5-22. In 2002, HAVA clarified the NVRA by siding with *the States* in that then-existing legal debate.

To begin with, HAVA amended the Failure-To-Vote Clause by inserting a rule of construction: "nothing in this paragraph may be construed to prohibit a State from using the" Confirmation Procedure to remove individuals. 52 U.S.C. § 20507(b)(2). This change "clarif[ied] the ability of election officials to remove from the voter registration list the name of an individual who has not responded to a notice from the registrar of voters and who has not voted in two or more consecutive general elections for Federal office." H.R. Rep. No. 107-730, pt. 1, at 81 (2002). But the Sixth Circuit interpreted this amendment to serve no purpose whatsoever.

In addition, HAVA *commanded* States to remove "registrants who have not responded to a notice *and* who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). But HAVA added that States could not remove voters "*solely* by reason of a failure to vote." *Id.* (emphasis added). The Sixth Circuit's holding cannot be squared with this "solely" text. When a State removes a voter *both* because the voter has failed to respond to a notice *and* because the voter has failed to vote, that State has not removed the voter *solely* because the voter has failed to vote.

In response to that point, the Sixth Circuit suggested that the Supplemental Process is illegal because it makes nonvoting the *sole* "trigger" for sending notices. Pet. App. 22a. This rewrites the Failure-To-Vote Clause. It bars *removing* voters for nonvoting; it says nothing about *sending notices* to voters for nonvoting. The Sixth Circuit also asserted that the Failure-To-Vote Clause must require States to do more than follow the Confirmation Procedure be-

cause otherwise the clause "would serve no purpose." Pet. App. 17a. That is so, according to the Sixth Circuit, because § 20507(d)(1) also requires States to follow the Confirmation Procedure to remove voters. *Id.* Yet § 20507(d)(1) requires States to follow the Confirmation Procedure *only* if they are removing voters for moving. Without the Failure-To-Vote Clause, States could use nonvoting alone to conclude that voters had become ineligible for other reasons (e.g., because they have died).

B. The Sixth Circuit Wrongly Favored An Oft-Criticized Canon Over The Canon Of Constitutional Avoidance

The Sixth Circuit read the Failure-To-Vote Clause to bar Ohio's Supplemental Process by expanding a rarely invoked canon at the expense of a commonly invoked one. Pet. App. 16a. This, too, warrants review.

1. *Narrow Reading Of Exemptions.* The Sixth Circuit strictly interpreted HAVA's amendment to the Failure-To-Vote Clause based on the canon that courts construe "exceptions to a statute's general rules" narrowly. *Id.* This canon does not apply here, and is of dubious validity in any event.

The canon does not apply for two reasons. For one, HAVA did not add an *exception* to the Failure-To-Vote Clause; it added an *explanation* to it. The amendment clarifies that "nothing in this paragraph may be *construed* to prohibit a State from" removing voters through the Confirmation Procedure. 52 U.S.C. § 20507(b)(2) (emphasis added). The Court has never applied this canon to such a clarification; the canon applies when a statute sets a general rule

(such as a ban on disclosing personal information) and then lists exceptions to that rule (such as circumstances when disclosure is allowed). *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013).

For another, the Court has never applied this canon to statutes that *expressly* serve competing purposes. Instead, the canon applies when a statute's general rule (like the Freedom of Information Act's disclosure requirement) furthers a central purpose, and an exception cuts against that purpose. *Milner v. Dep't of Navy*, 562 U.S. 562, 571-72 (2011). The NVRA, however, serves *dueling* purposes—to increase the rolls and to remove ineligible voters. 52 U.S.C. § 20501(b). To put a judicial thumb on the scale in favor of a provision serving one purpose at the expense of a provision serving the other upends the compromise that Congress reached.

Even if the canon did apply, the Court should consider this case to reassess it. The canon all too often stems from "inappropriate judicial antagonism to limitations on favored legislation." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 363 (2012). "Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation." *Id.* Perhaps for that reason, the Court has "declined to apply [the] canon on two recent occasions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting).

Indeed, this canon rose into prominence with, and shares all the defects of, the Court's now-entombed practice of implying private rights of action. *Compare Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392

(1960), *with J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). The same can be said for reading exceptions narrowly to further what courts believe to be good policy. Courts should not liberally construe remedies or strictly construe exceptions—"no matter how desirable that might be as a policy matter." *Id.* And having "sworn off the habit of venturing beyond Congress's intent" in the former context, the Court should reject the Sixth Circuit's attempt "to have one last drink" in the latter one. *Id.*

2. *Canon Of Constitutional Avoidance.* The Sixth Circuit also ignored a venerable canon—the canon of constitutional avoidance. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (citation omitted). The canon of constitutional avoidance thus instructs that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). If one reading "give[s] rise to serious constitutional questions," the Court chooses the other. *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 501 (1979).

The Sixth Circuit failed to heed this warning, even though its reading raised serious constitutional questions under the Elections Clause. That clause, while authorizing Congress to regulate the *manner* of

holding federal elections, leaves the States with the exclusive authority to determine voting *qualifications*. "Prescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'" *Inter Tribal*, 133 S. Ct. at 2258 (quoting The Federalist No. 60, at 371 (A. Hamilton)).

At the same time, a murky line often divides a constitutional "manner" regulation from an unconstitutional "qualification" regulation. Take registration. State courts initially debated whether it imposed an unlawful "qualification" that was in conflict with what could be seen as a state constitution's exclusive list of qualifications. *Morris*, 25 N.E. at 223-24 ("[S]ome courts hold[] registration to be a mere regulation as to the mode of exercising the right of suffrage, while other courts, and we think the better reasoned opinions, hold it to be adding a qualification."); *Inter Tribal*, 133 S. Ct. at 2259 n.9 (reserving question). State courts likewise split over whether failure-to-vote laws established additional qualifications. *Compare Duprey*, 518 P.2d at 808-09, *with Md. Green Party*, 832 A.2d at 222-23.

Heightening the seriousness of this constitutional question, the Court's guidance suggests that it will resolve ambiguities in the Elections Clause in favor of the States. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673-74 (2015). It "is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Id.* at 2673. Thus, the Court interpreted the word "Legislature" in the Elections

Clause expansively—allowing election regulations to be passed not just by a State's *legislative body* but also by its *citizens* acting through an initiative. *Id.* at 2673-74. Just as the word "Legislature" can be broadly read to protect state processes, *id.*, so too the word "Manner" can be narrowly read to do the same. Indeed, the founders adopted the clause for a narrow purpose—so that States could not destroy the federal government by refusing to hold elections. *Inter Tribal*, 133 S. Ct. at 2267 (Thomas, J., dissenting).

The Sixth Circuit's interpretation, however, charges headlong into this thorny constitutional issue. If registration and failure-to-vote provisions are *qualification* regulations (rather than *manner* regulations), the NVRA exceeds Congress's power under the Elections Clause. *Cf. id.* at 2263-69 (Thomas, J., dissenting). Thankfully, the canon allows the Court "to *avoid* [a] decision [on this] constitutional question[]." *Clark*, 543 U.S. at 381. The Court need only read the Failure-To-Vote Clause as permitting Ohio's Supplemental Process. *Cf. Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). At the least, unlike the Sixth Circuit, the Court should not ignore this canon.

C. The Sixth Circuit's Reading Conflicts With The Presumption That Congress Does Not "Hide Elephants In Mouseholes"

The Sixth Circuit interpreted the Failure-To-Vote Clause with blinders on as to the background against which Congress passed the NVRA. This oversight, too, conflicts with this Court's cases.

1. "[R]easonable statutory interpretation must account for . . . 'the broader context of the statute as

a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). In that respect, this Court presumes that Congress does not conceal far-reaching changes in vague phrases. *Gonzalez v. Oregon*, 546 U.S. 243, 267-68 (2006). Congress, that is, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Sixth Circuit's decision conflicts with this presumption because it interpreted the Failure-To-Vote Clause as enacting sweeping national reform. In 1993, most States used voter inactivity *in some way* when deciding whether to remove individuals from the rolls. *Supra*, at 3-4 & n.1. Of that large group, only a "handful" removed voters *solely* for failing to vote. S. Rep. No. 103-6, at 46. In the 30 or so other States, officials also sent voters a notice that provided them "with a way to update or prevent removal from the registration list." 138 Cong. Rec. 11,689 (1992) (Congressional Budget Office report on earlier bill). Under the Sixth Circuit's view, Congress meant to drastically depart from a common state practice, rather than narrowly bring a few States into line with their neighbors. Yet if Congress intended such a "broad" change, it would have *expressly* indicated that States could not send notices based on voter inactivity. *Gonzalez*, 546 U.S. at 267.

The NVRA did not do so. Instead, its Failure-To-Vote Clause and Confirmation Procedure struck a compromise. The Failure-To-Vote Clause meant that the "handful" of States that removed voters solely for inactivity "could not continue this practice." S. Rep. No. 103-6, at 46; 138 Cong. Rec. at 11,689. Most other States needed only to adjust their existing notice

practices to meet the Confirmation Procedure. Indeed, some States suggested this very compromise. When criticizing States that *automatically* removed nonvoters, Florida's Secretary of State praised Florida's procedures: sending a notice to voters who had not voted for two years, and removing them only if they failed to respond or vote for several more years. *Voter Registration: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 103d Cong. 173 (Jan. 26, 1993) (Statement of Jim Smith, Fla. Sec'y of State); Fla. Stat. Ann. § 98.081 (Westlaw through 1992 Special "H" Sess.).

2. This presumption has even more force here, given the context in which it arises. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Sixth Circuit's logic undercuts two aspects of that system.

Government Structure. "Among [its] background principles" of interpretation, the Court has recognized many that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond*, 134 S. Ct. at 2088. The Court, for example, has established a rule against the abrogation of a State's sovereign immunity, a requirement that conditions imposed on States under the federal spending power be clear, and a presumption against preemption. *Id.* at 2088-89. "Closely related" to these principles is a clear-statement rule requiring the Court to resolve ambiguities in favor of the States when legislation affects the federal-state balance. *Id.* at 2089; *see, e.g.*, *Sheriff v. Gillie*, 136

S. Ct. 1594, 1602 (2016). The Sixth Circuit's reading of the Failure-To-Vote Clause ignored this rule.

To be sure, this Court has stated that no "presumption against pre-emption" exists for federal laws passed under the Elections Clause. *Inter Tribal*, 133 S. Ct. at 2256. As a result, the Court will not protect state interests by choosing a *plausible* reading of those laws at the expense of the "*fairest* reading." *Id.* (emphasis added). The Sixth Circuit's decision, however, significantly expands on these statements by leaving no room for federalism whatsoever. Yet when a reading in favor of state authority is just as plausible as a reading against it, the clear-statement rule points to the former interpretation. If the clear-statement rule is broad enough to reach the Court's interpretation of the Elections Clause *itself*, *Ariz. State Legislature*, 135 S. Ct. at 2673-74, it is broad enough to reach the Court's interpretation of *federal legislation* passed under that clause.

Laboratories of Democracy. "This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Ariz. State Legislature*, 135 S. Ct. at 2673 (citation omitted). Election regulations provide a case in point, because it is "far from clear" which of the combinations of programs for maintaining the rolls best balances accuracy against cost. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Infinite tradeoffs exist. To save money, States might rely solely on the Safe-Harbor Provision and change-of-address data. *Cf.* N.J. Stat. Ann. § 19:31-15(b). But that could miss many ineligible voters. In 2006, a study found that "40 percent" of "undeliverable as addressed" mail was caused by "customers [who did]

not notify the Postal Service of address changes." U.S. Postal Serv., Office of the Inspector Gen., *Strategies for Reducing Undeliverable as Addressed Mail* 1 (2015), R.38-6, PageID#381.

To remedy that problem, States might send *mass* mailings to *all* voters, and follow up with notices for voters whose mailings are returned as undeliverable. *E.g.*, Ala. Code § 17-4-30(a). But that might entail significant costs, costs that States might believe are better spent elsewhere. In 2016, for example, Ohio spent roughly $1.25 million to mail absentee-ballot applications to most registered voters. Damschroder Decl., R.38-2, PageID#296. It also paid to join the Electronic Registration Information Center ("ERIC"), a non-profit corporation that requires members to send unregistered individuals information about registering. Electronic Registration Information Center, Inc., *ERIC: Summary of Membership Guidelines and Procedures*, R.49-11, PageID#22546. Ohio sent those notices to over 1.5-million eligible, yet unregistered, Ohioans before the 2016 registration deadline.

Further, the best maintenance programs for a particular State might turn on the ease with which individuals can register in that State. In that respect, registration has only gotten easier since the NVRA. Ohio, for instance, recently approved *online* registration. Ohio Rev. Code § 3503.20. Laws making it easier to register enhance the need for maintaining accurate lists (as the NVRA itself did).

In short, the Sixth Circuit's view—that Congress hid far-reaching, one-size-fits-all reform in what is, at the least, an ambiguous clause—ignored basic federalism principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 16-___

In the Supreme Court of the United States

JON HUSTED, SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE;
NORTHEAST OHIO COALITION FOR THE HOMELESS;
AND LARRY HARMON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0241p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3746

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:16-cv-00303—George C. Smith, District Judge.

Argued: July 27, 2016

Decided and Filed: September 23, 2016

Before: SILER, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

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ON BRIEF: Stuart C. Naifeh, Naila Awan, DĒMOS, New York, New York, Freda J. Levenson, Elizabeth Bonham, ACLU OF OHIO, Cleveland, Ohio, Richard Saphire, UNIVERSITY OF DAYTON SCHOOL OF LAW, Dayton, Ohio, Paul Moke, WILMINGTON COLLEGE, Wilmington, Ohio, for Appellants. Michael J. Hendershot, Eric E. Murphy, Steven T. Voigt, Jordan S. Berman, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Tovah R. Calderon, Vikram Swaruup, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Emmet J. Bondurant, BONDURANT MIXSON & ELMORE LLP, Atlanta, Georgia, Michelle E. Kanter Cohen, PROJECT VOTE, INC., Washington, D.C., Lauren M. Burke, JUDICIAL WATCH, INC., Washington, D.C., for Amici Curiae.

CLAY, J., delivered the opinion of the court in which GIBBONS, J., joined, and SILER, J., joined in part. SILER, J. (pp. 22–25), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge.

The A. Philip Randolph Institute ("APRI"), the Northeast Ohio Coalition for the Homeless

("NEOCH"), and Larry Harmon (collectively "Plaintiffs") filed suit seeking to enjoin the defendant, Ohio Secretary of State Jon Husted ("the Secretary"), from removing the names of registered voters from Ohio's voter rolls pursuant to the state's so-called Supplemental Process, which Plaintiffs allege violates the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*, and the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 20901 *et seq.* Plaintiffs also sought an injunction requiring the Secretary either to reinstate otherwise eligible voters who were improperly removed from the rolls pursuant to the Supplemental Process, or to count provisional ballots cast by such persons. Finally, Plaintiffs alleged that the change-of-address confirmation notices mailed to voters as part of the Supplemental Process fail to meet the standards for such notices set out in the NVRA, 52 U.S.C. § 20507(d)(2). Before us is Plaintiffs' appeal from the district court's order denying Plaintiffs' request for a permanent injunction and directing entry of judgment in favor of the Secretary. For the reasons set forth below, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

Factual History

In addition to maintaining procedures for removing the names of the deceased, those who have been adjudicated incompetent, and convicted felons from its voter rolls, *see* Ohio Rev. Code § 3503.18(A)–(C), Ohio utilizes two processes for identifying and purging from the rolls voters who are no longer eligible to vote because they have moved outside

their county of registration. *See* Ohio Rev. Code § 3503.21.[1] The first is Ohio's "NCOA Process," under which the Secretary's office compares the names and addresses contained in Ohio's Statewide Voter Registration Database to the National Change of Address ("NCOA") database. "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service." (R. 38-2, Damschroder Decl., ¶ 11.) The Secretary thereafter provides each county's Board of Elections ("BOE") with a list of voters registered therein who appear to have moved, based on the comparison of the two databases. The BOEs then "send[] a confirmation notice . . . to each individual identified." (*Id.*) That notice is a postage prepaid forwardable form on which the voter must indicate whether he or she still lives at the same address. Recipients of the notice are removed from the rolls if they: (1) do not respond to the confirmation notice or update their registration; *and* (2) do not subsequently vote during a period of four consecutive years that includes two federal elections.[2] *See* Ohio Rev. Code § 3503.21(A)(7), (B).

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[1] Both processes are performed on an annual basis. *See* Ohio Rev. Code § 3503.21(D).

[2] As discussed below, the NCOA Process mirrors the voter roll maintenance procedure outlined in Section 8, subsection (c) of the NVRA. *See* 52 U.S.C. § 20507(c). Because that subsection describes the NCOA Process as one way in which states "may" comply with their obligation under the NVRA to identify and remove voters who are no longer eligible due to a change of residence, *see* 52 U.S.C. § 20507(a)(4) and (c), the NCOA Process is sometimes referred to in this litigation as the "Safe-Harbor Process."

Ohio's so-called "Supplemental Process" is the second method the state uses for identifying and removing from the rolls voters who are no longer eligible to vote due to a change of residence. The Supplemental Process is largely identical to the NCOA Process, except in the way it begins: rather than identifying voters who may have moved by reference to the NCOA database, each county's BOE compiles a list of registered voters who have not engaged in any "voter activity" for two years. For the purposes of the Supplemental Process, "voter activity" includes "filing a change of address" with a designated state agency; "filing a voter registration card with the [BOE]; . . . casting an absentee ballot; casting a provisional ballot; [or] voting on election day."[3] (R. 42-1, Damschroder Dep., PageID 1548–49.) After compiling a list of inactive voters, each BOE sends a confirmation notice to those on its list. As with the NCOA Process, voters sent a confirmation notice are removed from the rolls if they subsequently fail to vote for four years and fail to either respond to the notice or re-register. In sum, under the Supplemental Process, a voter is purged from the rolls after six years of inactivity—even if he or she did not move and otherwise remains eligible to vote.

When this litigation began, the confirmation notices sent to voters pursuant to both the NCOA Process and Supplemental Process required that voters provide their name, current Ohio address,

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[3] According to the Secretary, BOEs carrying out the Supplemental Process "also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity." (R. 38, Def.'s Merits Br., PageID 257.)

date of birth, and either their Ohio driver's license number, their Social Security number, or a copy of a document verifying their identity and address. The notices required that voters provide such information regardless of whether they had changed address or were merely confirming that they still lived at the same address. Moreover, the notices did not adequately inform voters of the consequences of failing to respond to the notice; rather, the form indicated that the recipient's registration "may" be canceled if he or she did not respond, re-register, or vote in the next four years. (R. 42-13, 2015 Conf. Notice Form, PageID 1702.) Finally, the form failed to inform voters who had moved outside of Ohio on how they could remain eligible to vote in their new state.

As discussed below, the Secretary issued a new confirmation notice form during the pendency of this litigation. On the newly issued form, voters can confirm that they have not changed address by simply signing, dating, and returning the postage prepaid form. The new form also provides voters with the dates by which they must either return the form or vote in order to remain registered. Notably, however, the new form still lacks information on how persons who have moved to another state can register to vote in their new state.

Procedural History

This case began with two letters sent by NEOCH and APRI to the Secretary in December 2015 and February 2016, respectively. Both letters asserted that Ohio's Supplemental Process violated Section 8 of the NVRA. Not long after sending their letters, APRI and NEOCH representatives began meeting

with the Secretary in an attempt to resolve their concerns without litigation. Those meetings failed to produce results, causing Plaintiffs to file this suit in federal district court on April 6, 2016. Plaintiffs' complaint alleged two causes of action relevant to this appeal: first, that the Supplemental Process unlawfully removes registered voters from the rolls due to their failure to vote in violation of Section 8, subsection (b)(2) of the NVRA, 52 U.S.C. § 20507(b)(2); and second, that the confirmation notices sent to voters under both the NCOA Process and the Supplemental Process fail to meet the standards for such forms set out in the NVRA, 52 U.S.C. § 20507(d)(2).

The day after filing their complaint, Plaintiffs moved for a temporary restraining order ("TRO") prohibiting the Secretary from "removing eligible Ohio voters from the voter rolls on account of their failure to vote pursuant to Ohio's 'Supplemental Process.'" (R. 9, Mot. for TRO, PageID 36.) Plaintiffs' motion also requested a preliminary injunction compelling the Secretary to reinstate voters already removed from the rolls pursuant to the Supplemental Process. Four days later, Plaintiffs agreed to withdraw their request for a TRO in exchange for the Secretary's agreement not to initiate the Supplemental Process prior to July 1, 2016. A week after Plaintiffs filed their complaint, the parties agreed to engage in limited discovery and to address all the dispositive issues in the case through simultaneous briefing. The parties filed their briefs in May and June of 2016, with Plaintiffs styling their briefs as memoranda supporting motions for summary judgment and a preliminary injunction. On June 17, 2016—the day the parties'

final briefs were due before the district court—the Secretary issued a directive requiring BOEs to use a new version of the confirmation notice form. As discussed above, that new form corrected all but one of Plaintiffs' alleged deficiencies.

On June 29, 2016, the district court issued an order denying Plaintiffs' motions for summary judgment and a preliminary injunction; the order directed entry of judgment in favor of the Secretary. Addressing the parties' arguments under permanent injunction standards, the court began by rejecting Plaintiffs' arguments that the Supplemental Process violates the NVRA and the HAVA. The court held that because Section 8 of the NVRA does not explicitly dictate what information states may or must use as a "trigger" for sending a confirmation notice, that decision was impliedly left to the states. The court also concluded that the Supplemental Process does not violate the NVRA and the HAVA's prohibition on removing voters from the rolls solely by reason of their failure to vote because such removal occurs only after a voter has failed to vote *and* failed to respond to a confirmation notice.

Turning to the Plaintiffs' arguments regarding the legality of Ohio's confirmation notice form, the district court first noted the Secretary's promise that his newly issued form would be used during the upcoming voter roll purges. Relying on that promise, the court held that the Secretary's voluntary cessation of illegal activity was sufficient to moot Plaintiffs' challenges to the confirmation notice form. Finally, the court rejected Plaintiffs' argument that the newly issued form still violated 52 U.S.C. § 20507(d)(2)(B) by failing to provide those who have

moved out of Ohio with information on how to stay registered. The court held that this argument was waived because Plaintiffs' briefing failed to raise the argument, and that the argument failed on the merits in any event because it "defies logic" that the NVRA would require local registrars to "coach" voters on how to register in a different state. (R. 66, Order, PageID 23025.) Thus having rejected all of Plaintiffs' arguments on the merits, the district court held that no preliminary injunction was warranted and that judgment should be entered for the Secretary.[4] Plaintiffs filed their notice of appeal the following day.

DISCUSSION

Standard of Review

The parties agree that there are no disputes regarding the facts recounted above, and that the district court's denial of Plaintiffs' request for an injunction was based solely on its interpretation of the NVRA and the HAVA. "When reviewing the decision of a district court to grant or to deny a request for issuance of a permanent injunction, . . . legal conclusions are reviewed de novo." *Sec'y of Labor, U.S. Dep't of Labor v. 3Re.com, Inc.*, 317 F.3d 534, 537 (6th Cir. 2003) (internal quotation marks omitted); *see also Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir.

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[4] Absent from this summary of the holdings in the district court's order is discussion of Plaintiffs' claim that Ohio's Supplemental Process is applied in a non-uniform manner in violation of 52 U.S.C. § 20507(b)(1). The district court rejected that claim, and Plaintiffs' briefing on appeal does not address it. We therefore conclude that the claim is forfeited. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997).

2006) ("[S]tatutory interpretation questions are issues of law, which we review de novo."). We also review de novo the district court's conclusion that some of Plaintiffs' claims are now moot. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001).

Analysis

I. Plaintiffs' Challenge to Ohio's Supplemental Process

Congress' stated purposes in enacting the NVRA were, *inter alia*, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). "These purposes counterpose two general, sometimes conflicting, mandates: To expand and simplify voter registration processes so that more individuals register and participate in federal elections, while simultaneously ensuring that voter lists include only eligible . . . voters." *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1274 (D. Colo. 2010). Those sometimes conflicting mandates are reflected in the language of Section 8 of the NVRA, 52 U.S.C. § 20507, which is where our analysis must begin. *See Lewis v. United States*, 445 U.S. 55, 60 (1980) ("[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself."). Importantly, Section 8's language pairs the mandate that states maintain accurate voter rolls with multiple constraints on how the states may go about doing so.

Those constraints begin with subsection (a) of Section 8, which states that "[i]n the administration

of voter registration for elections for Federal office, each State shall . . . provide that the name of a registrant *may not* be removed from the official list of eligible voters *except*" under certain circumstances. 52 U.S.C. § 20507(a)(3) (emphasis added); *see also* S. Rep. No. 103-6, at 19 (1993) ("[O]ne of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction."); H.R. Rep. No. 103-9, at 18 (1993). The Act then provides an exhaustive list of circumstances justifying removal: "criminal conviction or mental incapacity as provided by state law, the death of the registrant, or . . . a change of the registrant's residence." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 376 (6th Cir. 2008) (citing 42 U.S.C. § 1973gg-6(a)(3)–(4), now codified as 52 U.S.C. § 20507(a)(3)–(4)). This case concerns the final circumstance justifying removal—change of residence—which is subject to its own mandate and accompanying constraints. Subsection (a)(4) of Section 8 requires that states "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant;" the Act thereafter specifies that any such program must be conducted "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B) . . . .

Subsection (b) provides two additional constraints on states' discretion. First, all roll maintenance procedures must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*)." *Id.* § 20507(b)(1). Second, and more pertinent to this appeal, subsection (b)(2) provides that roll maintenance procedures "shall not

result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). This language from subsection (b)(2) was later modified by the HAVA, which appended the following clause to the general prohibition on removal by reason of failure to vote:

> . . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id. By the HAVA's own terms, however, this language is not to "be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA]." *Id.* § 21145(a); *see also* H.R. Rep. 107-329, at 37 (2001) (indicating that under the HAVA, "removal of those deemed ineligible must be done in a manner consistent with the [NVRA]. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [the HAVA] leaves NVRA intact, and does not undermine it in any way.").

Subsections (c) and (d) of Section 8 provide two final constraints on states' roll maintenance procedures. First, subsection (c)(2)(A) provides that "any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters" must be completed "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c)(2)(A). Second, subsection (d)(1) establishes that states "*shall not* remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence" without first subjecting the registrant to the confirmation notice procedure outlined in that subsection. *Id.* § 20507(d)(1) (emphasis added). That mandatory confirmation notice procedure is the one described above as the final step of Ohio's NCOA Process and Supplemental Process: a forwardable postage prepaid and pre-addressed form is sent to a voter, and the voter is removed from the rolls if (1) he or she does not respond to the confirmation notice or update his or her registration, *and* (2) he or she does not subsequently vote during a period of four consecutive years that includes two federal elections. *See id.* § 20507(d).

Finally, we note that in subsection (c)(1) of Section 8, Congress provided states with an example of a procedure for identifying and removing voters who had changed residence that would comply with the NVRA's mandates and accompanying constraints. That subsection provides that "[a] State *may* meet the requirement of subsection (a)(4) by establishing a program under which" voters who appear to have moved based on information

contained in the NCOA database are sent subsection (d) confirmation notices. *See id.* § 20507(d)(1) (emphasis added). The parties do not dispute that Ohio's NCOA Process mirrors this so-called "safe-harbor" procedure and that the NCOA Process is thus permissible under the NVRA.

The focus of this case, therefore, is Ohio's Supplemental Process. Specifically, Plaintiffs argue that the Supplemental Process violates the clause of subsection (b)(2)—hereinafter referred to as the "prohibition clause"—prohibiting roll maintenance processes that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). The Secretary responds that the Supplemental Process is permitted by the exception to subsection (b)(2)'s prohibition clause added by the HAVA—hereinafter referred to as the "except clause"—which states: ". . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)." *Id.* The legality of Ohio's Supplemental Process can therefore be boiled down to two questions: whether the Process is expressly permitted by subsection (b)(2)'s except clause; and, if not, whether the Supplemental Process violates that subsection's prohibition clause.

A. The Supplemental Process is not expressly permitted by subsection (b)(2)'s except clause

Turning to the first operative question, it bears repeating that the Supplemental Process fully incorporates subsection (d)'s confirmation notice

procedure. Certainly, under the except clause's plain language, such incorporation is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote. *See id.* § 20507(b)(2) and (d)(1)(B)(ii). But that conclusion does not end our inquiry—the Supplemental Process does not *only* employ subsection (d)'s confirmation notice procedure. Rather, under the Supplemental Process, the confirmation notice procedure is "triggered" by a registrant's failure to engage in any "voter activity" for two years. We must therefore determine whether that trigger provision should be analyzed separately from the confirmation notice procedure, such that the trigger is subject to the prohibition clause; or, in the alternative, whether the Supplemental Process' incorporation of the confirmation notice procedure means that the entire Process—including the trigger—is permitted under the except clause.

The Secretary advocates for the second of these two positions. He states, for example, that "[t]he language that a cancellation 'shall not result' from a 'failure to vote' 'except' when coupled with the failure to 'respond[]' to an address-confirmation inquiry authorizes the Ohio Supplemental Process." (Def.'s Br. at 27 (emphasis omitted); *see also id.* at 41.) The operative language in this argument is the phrase "when coupled with," by which the Secretary implies that a process resulting in removal by reason of failure to vote is nevertheless permitted by the except clause so long as it is "coupled with" the procedures outlined in subsection (d). We note, however, that neither the phrase "when coupled with," nor any comparable language, appears in the

except clause's text.[5] *See* 52 U.S.C. § 20507(b)(2). The Secretary's argument is therefore flawed insofar as it requires us to "read[] a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Moreover, the Secretary's reading of the except clause would require us to ignore the traditional rule of statutory construction dictating that exceptions to a statute's general rules be construed narrowly. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutes] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *Detroit Edison Co. v. Sec. & Exch. Comm'n*, 119 F.2d 730, 739 (6th Cir. 1941) ("Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language."); *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:11, at 246–47 (6th ed. 2000) ("Subsidiary clauses which limit the generality of a rule are narrowly construed, as they are considered exceptions."). Contrary to that general rule, the Secretary would have us adopt an expansive interpretation of the except clause under

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[5] In a similar vein, the Secretary asserts that the except clause "authorizes removals that follow the procedures in subsections (c) and (d)." (Def.'s Br. at 27 (emphasis omitted).) This argument again adds language to the except clause, which does not authorize all "*removals that follow* the procedures in subsections (c) and (d)" (*id.* (emphasis added)); rather, the clause simply permits states to "us[e] the procedures" in those subsections. *See* 52 U.S.C. § 20507(b)(2).

which states can not only "us[e] the procedures described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2); rather, under the Secretary's interpretation, use of those procedures would render states' processes completely immune to the general rule that the except clause modifies. We decline to adopt this interpretation, and instead err on the side of giving maximum effect to the prohibition clause's general rule. *See, e.g.*, Singer, *supra*, § 47:11, at 250–51 ("[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.").

Further counseling against the Secretary's interpretation is the fact that reading "when coupled with" into the except clause would reduce the prohibition clause to mere surplusage. That is because the plain language of subsection (d)(1) provides that processes for removing voters based on change in residence *must* incorporate subsection (d)'s confirmation notice procedure. *See* 52 U.S.C. § 20507(d)(1). In other words, it is *required* that such processes be "coupled with" subsection (d)'s procedure. Thus, under the Secretary's interpretation, subsection (b)(2)'s prohibition clause would serve no purpose because all state procedures would necessarily be permitted by the except clause by virtue of their (mandatory) incorporation of the confirmation notice procedure. This reading of the NVRA would contravene the Supreme Court's repeated insistence that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014)

(quoting *Corley v. United States*, 556 U.S. 303, 312 (2009)).

The Secretary responds that his interpretation does not reduce the prohibition clause to surplusage because when read together, the prohibition and except clauses constitute a single "belt-and-suspenders" rule that merely "explains what is permitted and what is prohibited by describing both sides of the same coin." (Def.'s Br. at 49 (citing *TMW Enter., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577 (6th Cir. 2010)).) In other words, the Secretary would have us hold that subsection (b)(2) only prohibits processes that do not incorporate the confirmation notice procedure, and that the except clause simply reinforces that prohibition by expressly "permitt[ing]" use of the confirmation notice and safe-harbor procedures. (*Id.*) But this argument once again ignores the fact that subsection (d)(1) already mandates that "[a] State *shall not* remove the name of a registrant from the official list of voters" without performing the confirmation notice procedure. 52 U.S.C. § 20507(d)(1) (emphasis added). We decline to read subsection (b)(2) as a mere reiteration of that mandate. Perhaps more importantly, we find that the Secretary's "belt-and-suspenders" argument ignores the NVRA's plain language: subsection (b)(2)'s clauses are not written as alternative presentations of the same rule; rather, those clauses explicitly establish a general rule with a proviso. *See id.* § 20507(b)(2).

The Secretary also argues that the Senate and House reports accompanying the NVRA justify his interpretation of the except clause. Those reports both state, in pertinent part:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

S. Rep. No. 103-6, at 46 (1993); H.R. Rep. No. 103-9, at 30 (1993). This passage in the reports, the Secretary argues, suggests that subsection (b)(2)'s prohibition is intended to invalidate only those state processes that "simply drop the non-voters from the list without notice." *Id.* Thus, the argument goes, the reports indicate that the except clause permits any process that incorporates subsection (d)'s confirmation notice procedure.

This argument is problematic for at least two reasons. First, we may only look to the legislative history of a statute to "explain the meaning and purpose of a provision whose text is genuinely ambiguous." *Sherfel v. Newson*, 768 F.3d 561, 569 (6th Cir. 2014). As discussed above, the unambiguous language of Section 8 requires rejecting the Secretary's interpretation, lest we be forced to simultaneously write new language into, and essentially excise language out of, the NVRA. But even if we did conclude that the NVRA's language is ambiguous, we would find little solace in the even more ambiguous language of the

congressional reports on which the Secretary relies. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory."). Not only is the above-quoted passage from the congressional reports internally unclear as to which of the practices described therein is prohibited under the NVRA, the passage does not purport to provide an exhaustive list of processes that subsection (b)(2) was designed to prohibit. *See* H.R. Rep. No. 103-9, at 30 (1993); S. Rep. No. 103-6, at 46 (1993).

Based on the above, we reject the Secretary's contention that the Supplemental Process' incorporation of subsection (d)'s confirmation notice procedure means that the entire Supplemental Process is automatically permitted under the except clause. That interpretation of the NVRA would require us to improperly ignore "the language and design of the statute as a whole." *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (quoting *United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008)). We further conclude that the only reasonable reading of the NVRA is that any part of a state's roll maintenance process that does not mimic the expressly permitted procedures outlined in subsections (c) or (d)—in this case, the Supplemental Process' two-year "trigger" provision—is subject to subsection (b)(2)'s prohibition clause.

B. The Supplemental Process violates subsection (b)(2)'s prohibition clause

Having concluded that we must focus our analysis on the Supplemental Process' two-year trigger provision, we turn to the second dispositive question

in this case: whether that trigger provision "*result*[*s*]" in removal by reason of failure to vote. 52 U.S.C. § 20507(b)(2) (emphasis added). We typically "proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal brackets and quotation marks omitted) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002). In this case, the Supplemental Process' trigger provision explicitly uses a person's failure to engage in any "voter activity"—which includes voting—for two years as the "trigger" for sending a confirmation notice. Under the ordinary meaning of "result," the Supplemental Process would violate the prohibition clause because removal of a voter "proceed[s] or arise[s] as a consequence" of his or her failure to vote. *Id.*

As noted by the Secretary and the district court, however, subsection (b)(2)'s prohibition clause appears to have been given a more narrow interpretation by the HAVA. Passed in 2002, the HAVA created an "independent . . . requirement [that states] maintain an accurate list of eligible voters." *Colón-Marrero v. Vélez*, 813 F.3d 1, 13 (1st Cir. 2016). In connection with that requirement, the HAVA requires states to implement

> [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible

> voters. Under such system, consistent with the National Voter Registration Act of 1993 ([52 U.S.C. § 20501] et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

52 U.S.C. § 21083(a)(4)(A) (emphasis added). This section of the HAVA, the Secretary argues, restates the NVRA's prohibition and except clauses "in slightly different words" (Def.'s Br. At 32), and in so doing suggests that subsection (b)(2)'s prohibition on consideration of failure to vote only operates to prohibit state processes that remove registrants from the rolls "solely" by reason of their failure to vote.

In the end, however, this language from the HAVA does not change our analysis because operation of the Supplemental Process' trigger is ultimately based "solely" on a person's failure to vote. This is so, notwithstanding the fact that the Supplemental Process includes voting as one of several types of "voter activity" in which a voter must fail to engage in order to trigger the sending of a confirmation notice. We must assume not only that Congress intended the prohibition clause to play some role in the NVRA's statutory scheme, *see Clark*, 134 S. Ct. at 2248, but also that Congress intended the prohibition to be more than a paper tiger. But the clause would have no teeth at all if states could circumvent it by simply including "voting" in a disjunctive list of activities in which a registrant must fail to engage in order to "trigger" the confirmation notice procedure. In more concrete

terms, a state cannot avoid the conclusion that its process results in removal "solely by reason of a failure to vote," 52 U.S.C. § 21083(a)(4), by providing that the confirmation notice procedure is triggered by a registrant's failure either to vote *or* to climb Mt. Everest *or* to hit a hole-in-one.

For his part, the Secretary reiterates that the Supplemental Process incorporates subsection (d)'s requirement that the voter must fail to respond to a confirmation notice before that voter can be removed from the rolls. He thereafter argues that the Process' incorporation of that failure-to-respond requirement insures that voters are never removed "solely" for failure to vote. But this argument merely rehashes the one we rejected above—that a state's process for identifying and removing voters who have changed residence comports with subsection (b)(2)'s prohibition clause so long as it incorporates subsection (d)'s confirmation notice procedure. This interpretation of the NVRA would render the prohibition clause entirely superfluous because subsection (d)(1) already requires states to use the confirmation notice procedure. *See* 52 U.S.C. § 20507(d)(1). Once again, we decline "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

Finally, we note that the parties' arguments and the district court's order raise two additional questions: (1) whether processes for identifying and removing from the rolls voters who have changed residence *must* have provisions that "trigger" subsection (d)'s confirmation notice procedure; and

(2) what the NVRA and the HAVA have to say, if anything, about the form such "triggers" can or cannot take. While these questions are undoubtedly important, we need not answer them in order to hold that Ohio's Supplemental Process is impermissible under the NVRA. Regardless of whether "trigger" provisions are required, and regardless of what forms such "triggers" can or cannot take, it is clear that the Supplemental Process *does* include a trigger, and that that trigger constitutes perhaps the plainest possible example of a process that "result[s] in" removal of a voter from the rolls by reason of his or her failure to vote. 52 U.S.C. § 20507(d)(2). We therefore hold that Ohio's Supplemental Process violates Section 8, subsection (b)(2) of the NVRA.

II. Plaintiffs' Challenge to Ohio's Confirmation Notice Form

Below, the district court held: (1) that Plaintiffs' challenges to Ohio's confirmation notice form were mooted by the Secretary's adoption of a new form that addressed all but one of Plaintiffs' concerns; and (2) that Plaintiffs' remaining challenge to the form—that it fails to provide out-of-state voters with information on how to remain registered—is not supported by Section 8's statutory language.[6] We address these holdings in turn.

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[6] On appeal, the Secretary reiterates these arguments, but adds that Plaintiffs no longer have standing to bring their remaining challenge to the notice form because they have not shown that either they or their members have moved out of state—i.e., that they have been injured by the form's failure to provide registration information to out-of-state movers. This standing argument, however, is merely a mootness argument presented in another form. *Cf. Cleveland Branch, N.A.A.C.P.*,

A. Mootness

Claims become moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Generally, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Id.* (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). However, a narrow exception to that general rule exists in cases where a defendant claiming that its voluntary compliance moots a case successfully carries "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Davis*, 440 U.S. at 631 (holding that voluntary cessation can render an issue moot if "there is no reasonable expectation . . . that the alleged violation will recur" (citation and internal quotation marks omitted)). We have stated that it is a "rare instance" in which this standard will be met. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008).

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263 F.3d at 525 ("[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct was occurring at the time the complaint was filed, . . . while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." (citation and internal quotation marks omitted)). The Secretary does not dispute that Plaintiffs had standing to challenge the confirmation notice form at the outset of this litigation. We therefore do not address the Secretary's standing argument further.

The Secretary argues that because he is a governmental actor, we should defer to his assurances that his recent changes to the confirmation notice form are permanent. Although it is true that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties," *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)), such solicitude does not carry much of an official's burden of demonstrating that "there is no reasonable expectation . . . that the alleged violation will recur," *Davis*, 440 U.S. at 631. Indeed, the Supreme Court has declined to defer to a governmental actor's voluntary cessation, even where that cessation occurred pursuant to legislative process. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[T]he city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."); *see also League of Women Voters of Ohio*, 548 F.3d at 474 ("It is hard to see how the voluntary passage of legislation or issuance of directives can moot claims such as these." (footnote omitted)).

Nevertheless, apparently relying on such solicitude, the district court held that Plaintiffs' claims were moot because "[t]here is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future." (R. 66, PageID 23024.) We note as an initial matter, however, that this holding gets it backwards: Plaintiffs were not required to produce evidence suggesting that the Secretary planned on reengaging

in the allegedly illegal behavior after resolution of the case. *See Laidlaw*, 528 U.S. at 190. Rather, it was—and remains—the Secretary's "formidable burden" of "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The Secretary has failed to meet that burden in this case.

To begin, the new confirmation notice form was issued pursuant to the Secretary's "directive," rather than any legislative process. Thus, this is not a case in which reversing the cessation would be particularly burdensome. *Cf. Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012) (holding that the relevant issue was mooted by the defendant municipality's ordinance that was "years in the making"). Indeed, it appears from the record that the confirmation notice form is revised on a relatively frequent basis—at least four times in the last nine years, not counting the most recent revision. And because the Ohio Secretary of State is an elected official, there remains a distinct possibility that a future Secretary will be less inclined to maintain the confirmation notice in its current form. Finally, we note that the circumstances of the Secretary's issuance of the new form do not inspire confidence in his assurances regarding the likelihood of recurrence—he issued that new form on the same day as the parties' final merits briefs were due before the district court, attaching the form as an exhibit to his brief and only then presenting his mootness argument. This fact makes the Secretary's voluntary cessation appear less genuine. *See id.* (noting that the defendant municipalities' voluntary cessation "appear[ed] genuine").

Given these facts, we conclude that the Secretary has not carried his burden of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Plaintiffs' challenges to the confirmation notice therefore have not been rendered moot by the new form. Even if we felt differently about the possibility of recurrence, however, that alone would not render Plaintiffs' request for an injunction moot. A claim becomes moot only if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631; *see also Ragsdale*, 841 F.2d at 1365 (noting that an issue is moot only if "there are no remaining effects of the alleged violation"). As Plaintiffs note, the Secretary's newly-issued form does nothing to correct the fact that Ohio has, for years, been removing voters from the rolls because they failed to respond to forms that are blatantly non-compliance with the NVRA. Thus, in any event, the new form could not render all of Plaintiffs' claims for relief moot. *Cf. Anderson v. Spear*, 356 F.3d 651, 655 (6th Cir. 2004) ("As is readily apparent, the action of the legislature suspending the operation of certain provisions of the campaign law [in 2003] does not eliminate the case or controversy which existed by the operation of those laws in 1999.").

B. Merits

The final question before us concerns the merits of Plaintiffs' remaining challenge to the newly issued confirmation notice form. Plaintiffs argue that the form does not comply with the NVRA's mandate, contained in subsection (d)(2)(B) of Section 8, that

"[i]f the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," any confirmation notice sent to that voter must provide "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). Plaintiffs assert that the newly issued form violates this provision because it does not provide Ohio registrants who have moved out of state with information on how to re-register in their new state.[7] This requirement could be satisfied, Plaintiffs contend, by simply modifying the confirmation notice to direct the recipient to the Federal Election Assistance Commission's website, on which the recipient will find "instructions and guidance for voter registration in all states." (Pls.' Br. at 44 n.15.)

Below, the district court held that it "defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence." (R. 66, PageID 23025.) In support of this assertion, the court noted that the subsection on which Plaintiffs' argument is based provides that states must supply registrants with information on how to "*continue*" to be eligible to vote. (*Id.* (quoting 52 U.S.C. § 20507(d)(2)(B)).) Without much additional

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[7] Below, the district court concluded that this argument was waived because "Plaintiffs . . . raised this argument for the first time in their Reply brief." (R. 66, PageID 23024.) This was error; Plaintiffs' motion for summary judgment explicitly argued that Ohio's confirmation notice forms "do[] not tell people who have moved out of the state how they can register in their new state." (R. 39, Pls.' Mot. for Summ. J., PageID 1407 (citing 52 U.S.C. § 20507(d)(2)(B)).)

analysis, the district court proclaimed that the word "continue" necessarily means "continue to vote within that State—not register in another state." (*Id.*) The Secretary's arguments on appeal buttress this conclusion by arguing that "[n]o voter can 'continue to be eligible' to vote by moving from Ohio to Michigan, . . . [r]ather, the new Michigander must become a *newly registered* Michigan voter." (Def.'s Br. At 54.)

We find this argument unavailing. To begin, subsection (d)(2)(B)'s plain language contains no intra-state limitation. *See* 52 U.S.C. § 20507(d)(2)(B). Instead, that subsection provides that information on how to continue to be eligible to vote must be presented to anyone who "has changed residence to a place outside the registrar's jurisdiction." *Id.* The "outside the registrar's jurisdiction" language is the part of subsection (b)(2)(B)'s mandate that establishes its geographic applicability—had Congress intended to place geographic limitations on the mandate, it would have done so with this language rather than relying on a counterintuitive definition of the word "continue." Moreover, that word—"continue"—must be accorded its ordinary meaning. *Cloer*, 133 S. Ct. at 1893 ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."). "Continue" means to "keep up or maintain esp[ecially] without interruption a particular condition." Webster's Third New International Dictionary 493 (1986). Certainly, a registrant can "keep up or maintain . . . without interruption," *id.*, her condition of being "eligible to vote," 52 U.S.C. § 20507(d)(2)(B), regardless of

whether she must fully re-register or merely confirm her new address.

Further weighing against the Secretary's interpretation of subsection (d)(2)(B)—whereby "continuing" to vote excludes situations in which voters must fully re-register—is the fact that some states require voters to fully re-register even when they move to a new jurisdiction within the same state. *See, e.g.*, N.J. Stat. § 19:31-11 ("A voter who moves from an election district in one county to an election district in another county prior to the close of registration preceding an election shall register in the new county of residence . . . ."); Okla. Stat. tit. 26, § 4-118 ("Any registered voter who changes his or her residence to another county may apply for registration as an initial registrant in such other county."). Indeed, the 2007 version of Ohio's confirmation notice form suggests that Ohio itself once required voters who moved between counties to fully re-register. Under the Secretary's reasoning, intra-state movers subject to such re-registration requirements would not be entitled to "information concerning how [they] can continue to be eligible to vote," 52 U.S.C. § 20507(d)(2)(B), because the requirement that they re-register means that they are not "continuing" to be eligible to vote. Not only would this outcome completely defeat the purpose of subsection (d)(2)(B)'s mandate in states with re-registration requirements it would contradict the Secretary and district court's own conclusion that the word "continue" operates to free states of subsection (b)(2)(B)'s mandate with regard to out-of-state movers only.

In sum, we conclude that the district court erred by holding that Plaintiffs' claims regarding Ohio's confirmation notice are moot, and that the court erred by concluding that Ohio need not provide out-of-state movers with information on how they can continue to be eligible to vote.

CONCLUSION

For the reason state above, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, dissenting in part and concurring in part.

Because of the urgency of this issue and the need to allow the Supreme Court to consider it, I write the dissent/concurrence in condensed fashion. It does not reflect the extent to which I disagree with the majority opinion, although I respect it.

I commend the Secretary for issuing a new confirmation notice form during the pendency of this litigation. In all aspects of the law, except for directions on how the voter can continue his registration, it complies with the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).

Both sides agree that the language of the NVRA is unambiguous. "If the words of the statute are

unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005) (quoting *Hudson v. Reno*, 130 F.3d 1193, 1196 (6th Cir. 1997)).

This seems to be a much simpler process than as outlined in the majority opinion. The Secretary has established a Supplemental Process for purging voters from the voting rolls in Ohio. The key language in the statute attacked by the plaintiffs is from 52 U.S.C. § 20507(b)(2), which directs that States shall not remove "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." However, that same subsection allows a State to use "the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters" under certain circumstances. *Id.* That subsection indicates that if the voter

> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office,

then subsection (d) provides how States may cancel registrations of those who may have changed addresses. *Id.* It provides that the registrant should not be removed from the list of voters unless he or she confirms that he or she has changed residence or has failed to respond to a notice described in paragraph (2) and has not voted during a certain period of time. 52 U.S.C. § 2507(d)(1).

The part of the statute which is in contention is § 20507(b)(2), which indicates that the State shall not remove the voter "by reason of the person's failure to vote." The Secretary indicates that the person is not removed from the voting rolls until after the registrant is sent a notice by mail to find out if he or she still lives at the old address. Not until that person fails to respond, as plaintiff Larry Harmon did, does the State then list the voter as "inactive" in the registration database. Nevertheless, this "inactive" voter has all the rights to cast a regular ballot at any election, but if four years transpire without the registrant's voting, his or her registration record is canceled. However, if the registrant has any voting activity during those four years, he or she returns to an active voter status.

The text of the NVRA directs the States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" death or relocation. 52 U.S.C. § 20507(a)(4). The district court found the Secretary has made a reasonable effort to carry out that mandate, and I agree. The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four consecutive years, including two consecutive Federal elections following that notice.

The decision of the district court also follows the language in HAVA. The district court cited the following language from that act:

> [C]onsistent with the National Voter Registration Act of 1993 . . . , registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

52 U.S.C. § 21083(a)(4). As the Secretary has explained, it is his position that no voter is removed solely by reason of a failure to vote, and thus he has complied with the language from both statutes. I agree. The statutes leave it to the States to implement, and Ohio has developed a lawful procedure.

On the question of mootness, I agree with the majority that the plaintiffs had standing to bring the challenge to the notice form when the case was filed. However, I disagree with the conclusion that this case is not moot because the issues, save one, concerning the confirmation notice form have been corrected by the Secretary. Cessation of certain "conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). I agree with the district court that there is no evidence to show that the Secretary would change the current notice, and this court should give him deference on that question. However, I concur with the majority that the current notice does not comply with the

NVRA final mandate that when the Secretary sends the confirmation notice that the registrant has been purged, the notice must provide "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B).

The district court found that this issue was waived by the plaintiffs for failure to include it in their pleadings before filing their reply brief. However, their motion for summary judgment argued that the confirmation notice forms do not advise people who have moved out of the State how they could register in their new State. Although I agree with the district court that the State officials have been given an "onerous burden of coaching out-of-state residents through the registration process in their new States of residence," that is what the statute requires. The district court ruled that the mandate only applies to give the registrant information about registering in another location in Ohio, but the language of the statute is broader than that. In their brief on appeal, plaintiffs have suggested that an easy way to comply would be by directing voters to the Election Assistance Commission's website containing the federal form, which provides instructions and guidance for voter registration in all States. Although such a notice should be easy to attach to the notification to the registrants, it assumes that all registrants know how to utilize websites. Nevertheless, that is the relief which the plaintiffs have requested, and it seems simple enough for the Secretary to institute that amendment to the notice.

Therefore, I would affirm the decision of the district court, except insofar as it declined to require

the Secretary to amend its notice to voters who have moved to other States. I would grant relief on that sole issue.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3746

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,

Defendant-Appellee.

Before: SILER, CLAY, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Columbus.

Filed: September 23, 2016

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

APPENDIX B

2016 WL 3542450
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Ohio A. Phillip Randolph Institute, et al.,
Plaintiffs,

v.

Jon Husted, Ohio Secretary of State, Defendant.

Case No. 2:16-cv-303

Filed 06/29/2016

ORDER

GEORGE C. SMITH, JUDGE

*1 This matter is before the Court on Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction (Doc. 39), and the parties' cross-merits briefing[1] (Docs. 38, 49, 52, 56, and 57); as well as the

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[1] The parties initially agreed during a scheduling conference before Magistrate Judge Deavers that there were no factual issues to be tried and that this case could be resolved on cross-merits briefing. (*See* Doc. 25, Tr. of Conf.). There was some confusion by the parties as to what to label the merits briefing and Plaintiffs therefore titled their initial brief as a Motion for Summary Judgment and Permanent Injunction, or, in the alternative a Motion for Preliminary Injunction. Despite the earlier discussions and request for an expedited resolution of the case, Plaintiffs now request that if their current motion is denied, that the case should be set for trial. (Doc. 57, Pls.' Reply, 29 ("However, if this Court disagrees and believes that

Amicus Curiae Briefs filed by the Public Interest Legal Foundation (Doc. 60) and Judicial Watch, Inc. (Doc. 61).[2] The parties agree that all the necessary facts and legal arguments have been presented to the Court and this action is ripe for adjudication. After careful review of the parties' arguments, the Court finds in favor of Defendant and **DENIES** Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction.

I. BACKGROUND

Plaintiffs Ohio A. Philip Randolph Institute ("Randolph Institute") and the Northeast Ohio Coalition for the Homeless ("NEOCH") initiated this case seeking injunctive relief to prevent future removal of registered voters from the voter registration rolls pursuant to, *inter alia*, Ohio Secretary of State Directive 2015-15. Plaintiff Randolph Institute is a state chapter of the A. Philip Randolph Institute, a national organization for African-American trade unionists and community activists that was established in 1965 to forge an alliance between the civil rights and labor

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there *are* genuine issues of material fact, Plaintiffs respectfully request an expeditious trial to resolve any genuine issues of material fact, and entry of a preliminary injunction in the interim period.")). The Court agrees with the parties' initial assessment of this case that the issues are purely legal and can be resolved on the briefs. Therefore, to expedite this matter as requested by both parties and because all issues have been fully briefed, the Court will rule on the permanent injunction and enter final judgment.

[2] Both Amicus Curiae briefs support Defendant's position in this case.

movements. Randolph Institute is a senior constituency group of the American Federal of the Labor and Congress of Industrial Organizations ("AFL-CIO"). Randolph Institute devotes most of its time and resources to voter education, registration, and outreach efforts. (Doc. 37, Am. Compl., ¶ 12). Plaintiff NEOCH is a nonprofit charitable organization who helps homeless and at-risk men, women, and children in the city of Cleveland by ensuring they have access to services, health screenings, legal assistance, and ensuring that every homeless person is provided the opportunity to vote and participate in the democratic process. (*Id.* at ¶ 15).

*2 Plaintiff Larry Harmon is a 59 year-old U.S. Navy veteran who has resided at the same address in Portage County, Ohio for approximately 15 years. Mr. Harmon voted in the 2004 and 2008 Presidential elections, but did not vote, or engage in any voter activity, from 2009 through 2015. In November 2015, Mr. Harmon went to the polls on Election Day to vote, but was told that his name did not appear in the poll book. In fact, Mr. Harmon had been removed from the Portage County voter registration rolls pursuant to Ohio's current practices and procedures for maintaining accurate voter rolls. The propriety of these practices and procedures serve as the focal point of this litigation. Mr. Harmon does not recall receiving a confirmation notice to confirm his voter registration.

Defendant Ohio Secretary of State, Jon Husted ("Secretary Husted") is Ohio's chief election officer and is charged with management of voter registration and election administration throughout

the state. *See* Ohio Rev. Code § 3501.04. Ohio law requires the Secretary of State to adopt "[a] process for the removal of voters who have changed residence," which is required to use information from the U.S. Postal Service's National Change of Address program (the "Ohio NCOA Process"). Ohio Rev. Code §§ 3501.05(Q); 3503.21. In addition to the Ohio NCOA Process, Ohio also uses a supplemental process to combat voter roll inaccuracies brought about by the frequent occurrence of voters changing addresses without notifying the United States Postal Service (the "Ohio Supplemental Process"). Once a voter is identified under either process, a confirmation notice is sent to the voter. A voter's failure to respond to the confirmation notice can ultimately lead to their registration being cancelled. The difference between the two processes is how a voter is identified to receive a confirmation notice. Under the Ohio NCOA Process, the United States Postal Service's program indicates that a voter has a forwarding address on file. Under the Ohio Supplemental Process, a voter is notified following a two-year period of non-voting. Here, Plaintiffs challenge the Ohio Supplemental Process as a violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 *et seq*. Section 8 of the NVRA establishes the requirements that states must follow to maintain their respective voter registration rolls. 52 U.S.C. § 20507.

A. History of Ohio's Voter Registration Roll Maintenance

Prior to the enactment of the NVRA, Ohio updated its voter registration roll pursuant to Article V, § 1 of the Ohio Constitution, which stated in part,

"[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Ohio Const. art. V, § 1.1. In 1993, Congress passed the NVRA "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" while "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(1), (4). Among other requirements, the NVRA requires states to "make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant[.]" 52 U.S.C. § 20507(a)(4)(B).

Following the enactment of the NVRA, the 120th Ohio General Assembly passed Amended Substitute Senate Bill No. 300 (effective January 1, 1995) and eliminated the statutory language that required boards of election to cancel voters solely because of their inactivity. Since 1994, Ohio has used two different processes to make a reasonable effort to maintain the accuracy of its voter registration rolls. Ohio implemented its current procedures to comply with and mirror the procedures established by the NVRA. The December 9, 1994 Directive from Ohio's Secretary of State outlining Ohio's new voter registration maintenance procedures began with the following:

> *3 This Directive prescribes programs and procedures to identify and cancel the voter registrations of ineligible persons in accordance with Am. Sub. S.B. 300, effective January 1, 1995 and the National Voter Registration Act of 1993

> (NVRA). Am Sub. S.B. 300 enacts new revised code sections 3503.19 and 3503.21, and amends current revised code sections 3501.01, 3501.05, 3501.11, 3503.18, and 3503.24 relating to the cancellation of ineligible voters.
>
> My goal in adopting these programs and procedures is to provide all boards of elections with workable, cost effective methods to remove ineligible persons from the voter registration rolls in accordance with the new requirements of state and federal law.

(Doc. 38-1, Ohio Secretary of State Directive 94-36).

B. Ohio's Voter Registration Roll Maintenance Procedures

Ohio currently utilizes two procedures to maintain the accuracy of its voter registration rolls: the Ohio NCOA Process and the Ohio Supplemental Process. *See* Ohio Rev. Code § 3503.21.

1. Ohio NCOA Process

The Ohio NCOA Process is conducted on an annual basis. Under the Ohio NCOA Process, the Secretary of State's Office compares "the records in the Statewide Voter Registration Database ("SWVRD") to the NCOA database." (Doc. 38-2, Damschroder Decl., ¶ 11). "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service ("USPS")." (*Id.*). During the Ohio NCOA Process, the Secretary "provides the boards with a file listing the possible voter matches to the NCOA file." (*Id.*). The boards of elections compare the county file to the NCOA file and then "send a confirmation notice (Form 10-S) to each elector

identified." (*Id.* at ¶¶ 11, 17). The confirmation notice is a postage pre-paid forwardable form that a voter can return to indicate whether the voter still resides at the same location. (*Id.*).

In December 2013, an amendment by the General Assembly to Senate Bill 200 required the Ohio Secretary of State to conduct the Ohio NCOA Process on an annual, rather than a biennial, basis. At that time, the Secretary also moved the corresponding Ohio Supplemental process to an annual basis. (*Id.* at ¶ 9).[3]

Pursuant to the Ohio NCOA Process, an individual's voter registration is cancelled when he or she: (1) appears on the list of individuals who have filed a change of address with the USPS and a different address appears for that individual in the SWVRD; (2) fails to respond to the confirmation notice sent by forwardable mail with a pre-paid return form; and (3) then fails to engage in any voter activity for a period of four consecutive years, including two federal general elections (one being a presidential general election) from the date that the confirmation card is mailed. (*Id.* at ¶ 21).

2. Ohio Supplemental Process

The Ohio Supplemental Process begins after the Ohio NCOA Process is completed and "seeks to

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[3] The Secretary of State maintains that Ohio is also obligated to perform both processes on an annual basis pursuant to a Settlement Agreement that ended prior litigation. *See Judicial Watch v. Husted*, Case No.: 12-cv-792 (Sargus, J.) (hereinafter, the *Judicial Watch* case). A copy of the Settlement Agreement was filed as Doc. 38-4, Exhibit D to Defendant's Initial Brief.

identify electros whose lack of voter activity indicates they may have moved, even though their names did not appear on the NCOA generated list." (Doc. 38-7, Ex. G to Def.'s 1st. Br., Ohio Secretary of State Directive 2009-05; *see also* Doc. 38-2, Damschroder Decl., ¶ 14). As part of the Ohio Supplemental Process, "BOEs use data points (e.g., voting history) to compile the data for the supplemental process." (Doc. 38-2, Damschroder Decl., ¶ 14). In the Ohio Supplemental Process, each individual board of elections compiles its own list of individuals who, according to the board's records, have not engaged in any voter activity for two years.[4] (*Id.* at ¶ 15). The boards of elections send each such individual identified a confirmation notice by forwardable mail with a postage pre-paid return envelope. (*Id.*). An individual who receives a confirmation notice and needs to update his or her address may do so using the State's online change of address system. (*Id.* at ¶ 19). Secretary Husted implemented this online change of address system in 2012. (*Id.*). An individual receiving a confirmation notice may also return the postage pre-paid form free of cost through the mail. If the individual returns the confirmation notice and provides a new address, the individual's registration record is updated by the appropriate

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[4] Voter activity includes: "a voter completing the confirmation card and returning it; filing a change of address either through BMV or one of the other designated agencies; filing a voter registration card with the board of elections; ... casting an absentee ballot; casting a provisional ballot; voting on election day." (Doc. 42-1, Damschroder Dep. 66:19-67:5). Boards also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity. (*Id.* at 70:17-20; 130:9-14).

board of elections with the new address. (*Id.* at ¶ 20). If the individual returns the confirmation notice confirming that his or her current address is still accurate, the board notes on the individual's registration record that the confirmation notice was returned to the board and the address was confirmed. (*Id.*).

*4 If an individual fails to return the confirmation notice, fails to update his or her voter registration, and fails to engage in any other voter activity, the individual will be marked as "inactive" in the registration database. (*Id.*). This "inactive" individual has all the rights of an otherwise qualified elector, including the ability to cast a regular ballot at any election. (*Id.*). If, however, four years (including two federal general elections) passes without voter activity, at that time the individual's voter registration record is cancelled. (*Id.*).

Plaintiffs allege that thousands of Ohio voters, like Plaintiff Mr. Harmon, have been removed from the voter registration rolls pursuant to the Ohio Supplemental Process. Plaintiffs assert that "[i]n Cuyahoga, Greene, Hamilton, and Medina Counties, for example, nearly 70,000 voters were purged in 2015 pursuant to the [Ohio] Supplemental Process, with no indication that any of them had actually moved." (Doc. 37, Am. Compl., ¶ 46). Plaintiffs state that "the [Ohio] Supplemental Process disproportionately burdens Ohio's most vulnerable and marginalized citizens. In Cuyahoga County, for example, the purged voters disproportionately reside in communities of color and low-income communities." (*Id.* at ¶ 48).

On December 17, 2015, Plaintiff Randolph Institute, through its counsel, sent a certified letter and email to Defendant Husted, notifying him that the State of Ohio was not meeting its obligations under Section 8 of the NVRA. On February 23, 2016, Plaintiff NEOCH, through its counsel, notified Defendant Husted of the alleged violations and both letters provided notice of their intent to sue for violations of Section 8 of the NVRA. Plaintiffs then initiated this case on April 6, 2016.

II. STANDARD OF REVIEW

Plaintiffs initially filed this case and immediately moved for a Temporary Restraining Order and Preliminary Injunction., and they are now seeking a permanent injunction. The "standard for granting a permanent injunction is essentially the same as the standard for a preliminary injunction." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1147 (S.D. Ohio 2000) (Smith, J.). However, when a plaintiff seeks a permanent injunction, the plaintiff must show actual success on the merits, rather than a mere likelihood of success on the merits. *Id.*, (citing *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, n. 12 (1987)). In the Sixth Circuit, it is well-settled that the following factors are to be considered in determining whether injunctive relief is necessary:

> (1) Whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the movant has shown irreparable injury; (3) whether the issuance of a preliminary [permanent] injunction would cause substantial harm to others; and (4) whether the

public interest would be served by granting injunctive relief.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000) (citing *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*)). These four considerations are not required elements of a conjunctive test, but are rather factors to be balanced. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (finding that no single factor is determinative).

The decision whether or not to issue injunctive relief falls within the sound discretion of the district court. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). A permanent injunction shall only be ordered upon showing (1) "that [plaintiff] has suffered irreparable injury;" (2) "there is no adequate remedy at law;" (3) "'that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted;'" and (4) "it is in the public's interest to issue the injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (quoting *eBay Inc., et al. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Moreover, Plaintiffs must establish their case by clear and convincing evidence. *Damon's Rests., Inc. v. Eileen K. Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Aug. 30, 2006) (King, M.J.). To meet this burden, the movant's evidence "must more than outweigh the [opposing] evidence," but must also "persuade the court that its claims are highly probable." *Id.*

III. DISCUSSION

*5 Plaintiffs have alleged four violations of Section 8 of the NVRA of 1993: (1) that the Ohio Supplemental Process violates the NVRA by

removing voters from the voter registration rolls based on their failure to vote; (2) Ohio's voter maintenance procedures are unreasonable; (3) Ohio's voter maintenance procedures are not conducted uniformly; and (4) the confirmation notice is legally deficient. Defendant, on the other hand, asserts that the Ohio Supplemental Process does not remove a voter solely for not voting and Ohio's processes for maintaining the voter registration rolls are specifically outlined and authorized by the plain language of the NVRA. This Court will consider the parties' arguments on each of the alleged violations in turn.

A. Success on the Merits

1. National Voter Registration Act

There is no dispute that federal law requires states to implement procedures to maintain voter registration rolls. Specifically, the two applicable statutes are the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA"). Plaintiffs allege that Defendant's use of the Ohio Supplemental Process "has violated and continues to violate Section 8 of the NVRA by removing voters based on a failure to vote and without following the procedures required by the NVRA for removing voters who have changed residence. 52 U.S.C.A. § 20507." (Doc. 37, Am. Compl., ¶ 56).

Notably, both sides argue that the language of the NVRA is unambiguous. "If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005). Despite both parties arguing in favor of a

plain-meaning interpretation, they each reference the legislative history of the NVRA, citing selective quotes in support of their respective positions. (*See* Doc. 39, Pls.' Mot., 23; Doc. 52, Pls.' Opp. Br., 11–12; Doc. 49, Def.'s 2d Br., 8–9). It is well-settled that if a statute lacks ambiguity, then "there is no need to consult legislative history." *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002). Similarly, Plaintiffs' reliance on the Department of Justice's interpretations of the NVRA is misplaced because the Court need not consider those interpretations where the NVRA is clear on its face.

The NVRA, 52 U.S.C. § 20507, titled "Requirements with respect to administration of voter registration," specifically provides:

> **(b)** Confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –
>
> > **(1)** shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (*42 U.S.C. 1973* et seq. [*52 USCS §§ 10301* et seq.]); and
> >
> > **(2)** shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs.

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

*6 **(B)** if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in

subsection (d)(2) to confirm the change of address.

(2) (A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systemically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) Removal of names from voting rolls.

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)

(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election

during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the

> registrant can continue to be eligible to vote.
>
> **(3)** A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

52 U.S.C. § 20507(b)-(d).

Plaintiffs assert that the plain language of the NVRA, as set forth above, prohibits voter list-maintenance procedures that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reasons of the person's failure to vote . . . ." 52 U.S.C. § 20507(b)(2). Plaintiffs seemingly ignore the rest of that clause, which is separated by a comma and provides exceptions that allow for the procedures specifically described in both subsections (c) and (d). Rather, Plaintiffs argue that subsections (c) and (d) are essentially just one exception that should be considered together as part of the address-change confirmation procedure. (Doc. 57, Pls.' Reply, 4–5). As such, Plaintiffs urge the Court to interpret the NVRA as a mandate that voter inactivity can only be considered after the confirmation notice is sent and cannot be used as the trigger for initiating the address-confirmation process.

Plaintiffs accuse Defendant of "cherry-picking one of [the NVRA] exceptions and treating it as though it were the basic rule—contrary to the statute's actual words—[which] is not a "plain-meaning" interpretation." (*Id.* at 6 (citing *United States v. Medlock*, 792 F.3d 700, 709 (6th Cir. 2015) ("[I]t is a 'cardinal principle of statutory construction that

courts must give effect, if possible, to every clause and word of a statute.' " (quoting *Williams v. Taylor*, 529 U.S. 362, 364 (2000)))))). In reality, it is Plaintiffs who focus on a single clause in Section 20507(b)(2) and not the entirety of the statute.

Further, Plaintiffs want the Court to read requirements and language into the NVRA that simply are not there. Plaintiffs argue that Ohio may only send a confirmation notice to a voter "to confirm a change of residence after the state has already obtained reliable second-hand information, independent of the voter's failure to vote, indicating that a voter has moved." (Doc. 39, Pls.' Mot., 26). Plaintiffs continue, "[a]llowing states to *initiate* the voter-removal process based on a failure to vote—as Ohio is now doing—would eviscerate subsection (b)'s plain language, allowing the exception to swallow the rule." (*Id.* at 27). However, this is not what the NVRA states. The plain language of the NVRA contradicts Plaintiffs' position. The phrases Plaintiffs rely on, such as "reliable second-hand information," "independent of the voter's failure to vote," "initiate," "trigger," etc., are nowhere to be found in the NVRA. These are phrases that Plaintiffs would like the Court to write into the NVRA.

Subsection (d), set forth in detail above, is the basis for the Ohio Supplemental Process. This section does not specifically state who should be sent a confirmation notice or when that confirmation notice should be sent. Therefore, Defendant argues, and the Court agrees, that that decision is left to the states. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) ("Our duty [is] to refrain from reading a

phrase into the statute when Congress has left it out."); *see also Bates v. U.S.*, 522 U.S. 23, 29 (1997) (courts "resist reading words or elements into a statute that do not appear on its face").

*8 In 2002, Congress addressed this section of the NVRA in HAVA, explaining:

> [C]onsistent with the National Voter Registration Act of 1993 ..., registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed ***solely*** by reasons of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added). The Ohio Supplemental Process is consistent with both the NVRA and HAVA as voters are never removed from the voter registration rolls ***solely*** for failure to vote. Pursuant to the Ohio Supplemental Process, a confirmation notice is sent to voters who have been inactive for two years. If they do not respond to the confirmation notice, they are placed on an inactive list, but their ability to vote does not change at that time. If those on the inactive list then fail to vote in the next two general federal elections, one of which is a Presidential election, then those voters are removed from the voter registration rolls. Therefore, it is only after a person ***both*** (1) fails to respond to the confirmation process, ***and*** (2) subsequently fails to vote in the following two general federal elections that he or she is removed from the voter registration rolls. As Amicus Judicial Watch aptly describes the process, "registrants are *queried* on the basis of their failure to vote, but not *removed* on that basis." (Doc.

61, Judicial Watch Amicus Br., 7 (emphasis in original)). The NVRA does not mention— explicitly or implicitly—the events that need or need not happen before a state may initiate its confirmation process. For instance, as applicable here, the NVRA does not prohibit a state from sending a confirmation notice to voters who have not voted for a certain period of time. Using the discretion left to the states, they have undertaken different ways of beginning the list maintenance process.[5] *See* 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

While there is a general lack of actual case law analyzing Section 8 of the NVRA, it bears mentioning that both parties have cited several cases in which the statute has been litigated and resolved without a final court order. Namely, Indiana entered into a consent decree with the DOJ in 2006 whereby the State would engage in a process that is more extensive than that employed in Ohio. *See U.S. v. Indiana*, 1:06-cv-1000-RLY-TAB (S.D. Ind. 2006). In addition, the City of Philadelphia reached a settlement agreement with the DOJ in 2007 whereby the City would consider voter inactivity as part of its voter roll maintenance process. *See U.S. v. City of Philadelphia and Philadelphia City Commission*, C.A. No. 06-4592 (E.D. Pa 2007). In addition, as noted above in footnote 3, this Court oversaw a settlement agreement reached by Defendant Husted and Judicial Watch in 2014. (*See* Doc. 38-4, *Judicial*

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[5] Others states use inactivity to begin their list maintenance processes, including Missouri, Tennessee, Georgia, West Virginia, Montana, and Florida.

Watch v. Husted Consent Decree.) That agreement is still in effect and sets forth Defendant Husted's obligations with respect to Ohio's voter registration maintenance processes. These agreements are not controlling in the instant matter, but they do lend credence to the fact that Ohio's voter roll maintenance processes comport with the NVRA's requirements.

*9 Accordingly, the Court finds that the Ohio Supplemental Process does not violate the NVRA, and in fact, the unambiguous text of the NVRA specifically permits the Ohio Supplemental Process.

2. Reasonableness

Plaintiffs argue that the Ohio Supplemental Process violates the NVRA because it is "unreasonable" in violation of 52 U.S.C. § 20507(a)(4)(B). Plaintiffs argue that because the Ohio Supplemental Process does not reliably identify whether a voter has moved, it is not a reasonable method for purging the voter rolls and thus, it violates the NVRA. Plaintiffs ask the Court to adopt the definition of "reasonable" provided by the Department of Justice as "based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history." (Doc. 39, Pls.' Mot., 30 (quoting *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. May 4, 2016), ECF No. 19)). Defendant argues that the statute does not "create some nebulous reasonableness standard." (Doc. 49, Def.'s 2d Br., 10).

Plaintiffs argue that the NVRA requires that the Ohio Supplemental Process must be reasonable

under 52 U.S.C. § 20507(a)(4)(B), but the language in the statute does not contain such a requirement. The statute specifically provides:

> **(a)** In general. In the administration of voter registration for election for Federal office, each State shall—
>
> * * *
>
> **(4)** conduct a general program that makes a ***reasonable*** effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—
>
> **(A)** the death of the registrant; or
>
> **(B)** a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

52 U.S.C. § 20507(a)(4)(B) (emphasis added). The language of the statute is clear that the "program" shall be "general" and the "effort" shall be "reasonable." Notably, the statute does not say that the "program" must be "reasonable." Further bolstering this conclusion is that the statute sets forth a specific set of requirements for programs used to remove voters who have moved. The statute requires that such a program be completed "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). Again, it does not say that such a program needs to be reasonable nor is such a requirement contained within subsections (b), (c), or (d). The Court need not consider outside sources for the interpretation of the statute when the statute is clear on its face. *Detroit Receiving Hosp. & Univ. Health Ctr. v. Sebelius*, 575 F.3d 609, 613 (6th Cir. 2009) ("Our analysis begins and ends with the

statute, because the provisions at issue are clear.") (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Accordingly, the Court finds that there is no reasonableness requirement for programs that are otherwise lawful under subsections (b), (c), and (d).

However, even if the Court were to accept that the NVRA requires Defendant Husted to use reasonable means to purge the voter rolls, Plaintiffs' only case source for what should be considered reasonable is *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001). Plaintiffs argue "[i]f a state chooses to use another source of change-of-address information instead of or in addition to NCOA, that source must be similarly reliable." (Doc. 39, Pls.' Mot., 31). Plaintiffs rely on dicta from *Welker* for this conclusion, quoting that "the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records." (*Id.*, emphasis added by Pls. (quoting *Welker*, 239 F.3d at 599)). Plaintiffs take the language in *Welker* one step further by asking this Court to determine that based on *dicta* from *Welker*, a state must use information that reliably indicates a voter has moved. The *Welker* Court made no such holding and the Court will not add language to the *Welker* decision. In actuality, the Ohio Supplemental Process uses information that is both reliable and comes from a government agency. A voter's non-participation in an election may not be an ideal indicator of whether a voter has moved, but Plaintiffs cannot dispute that the information itself—that the

voter did not participate in an election—is reliable and comes from a government agency. In the Court's view, the *dicta* in *Welker* requires nothing more. Accordingly, Plaintiffs' argument that the Ohio Supplemental Process is unreasonable is without merit.

3. Uniform Implementation

***10** Next, Plaintiffs allege that the Ohio Supplemental Process violates the NVRA because it is applied in a non-uniform manner. Plaintiffs argue that counties conduct the process at different times, that counties can chose whether voter activity includes certain actions, and that the notices sent by each county are different. Defendant argues that Plaintiffs do not have standing to raise this argument because Plaintiffs failed to provide pre-litigation notice of the claim as required by the NVRA. Further, Defendant asserts that even if Plaintiffs have standing, the Ohio Supplemental Process is uniform and nondiscriminatory. To reach the merits of this claim, the Court will assume *arguendo* that Plaintiffs do have standing.

The "uniform and nondiscriminatory languages arises under 52 U.S.C. § 20507(b)(1) which requires that any program which protects the integrity of the voting process "shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Plaintiffs argue that a voter's county determines if and when a voter is removed from the rolls while Defendant argues that all of Ohio's 88 counties have the same 120-day window in which to purge their rolls and that each county has the discretion to determine which activities constitute "voter activity." Plaintiffs make no argument that

the differences between counties are discriminatory, instead, Plaintiffs argue that the differences improperly lack uniformity.

Plaintiffs ask the Court to adopt the following standard: "To be uniform and non-discriminatory, a state's list-maintenance program must not treat similarly situated voters differently based on irrelevant characteristics." (Doc. 39, Pls.' Mot., 22 (citing *Project Voter v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006)). But the county in which one resides is not an irrelevant characteristic in Ohio. Ohio's voting system delegates significant authority to the county boards of elections. Counties are responsible for generating ballots, delivering ballots, the selection and maintenance of voting equipment, determining whether certain petitions are needed, and for administering the actual election on Election Day. Ohio Rev. Code §§ 3501.06; 3501.11; 3506.02; 3506.03; 3513.051. Further, a person's physical location is of course determinative of which issues and candidates on which a person may vote. Ohio Rev. Code §§ 3503.06, 3503.07, 3503.17. In fact, county boards of elections in Ohio are specifically granted the responsibility of establishing, defining, rearranging, and combining election precincts. Ohio Rev. Code §§ 3501.11(A). There are numerous reasons why a county may operate a voter-maintenance program differently from a neighboring county including, but not limited to the county budget, the county population, and county access to data. In Ohio, the county in which one resides is anything but an irrelevant characteristic. Accordingly, under Plaintiffs' test, there is uniformity and non-discrimination because

the Court cannot find that voters in different counties are similarly situated.

However, even if the Court were to find the process non-uniform, the Ohio Supplemental Process is otherwise lawful, meaning that those who did not get to vote because they were purged before the election were properly purged. Accordingly, the effective disparity is not that some voters were purged wrongfully, but rather, that some voters improperly remained on the rolls and should not have had the right to vote. Notably, HAVA requires that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office **shall be removed** from the official list of eligible voters . . . ." 52 U.S.C. § 21083(a)(4). But even if Defendant is in violation of HAVA for not removing voters who should be purged, Plaintiffs' Amended Complaint does not ask this Court to address those who should not have been able to vote, but rather to restore those "unlawfully purged." (*See* Doc. 37, Am. Compl., ¶¶ 58, 62-63(ii)). As set forth, Plaintiffs' Amended Complaint does not seek any relief for an Ohio Supplemental Process which improperly allows some to vote. Finally, although it appears the timing of the Ohio Supplemental Process could be more narrowly tailored, the Court cannot find a 120-day period for voter-roll-maintenance non-uniform where the Ohio Supplemental Process uniformly removes voters who have no voter activity and fail to respond to a confirmation notice in accordance with the NVRA. Accordingly, Plaintiffs' claim fails on the merits.

4. Confirmation Notice

*11 Plaintiffs argue that the version of Ohio's Confirmation Notice in place at the time this litigation began violates the requirements of Section 8(d) of the NVRA. Specifically, Plaintiffs argue that the Confirmation Notice does not notify voters of the date by which they must respond to avoid adverse consequences; it fails to inform voters of the consequences of not responding to the confirmation notice; it does not inform people who have moved out of the state how they can register in their new state; and it requires voters to provide the same information required to register to vote. Plaintiffs have sought injunctive relief "directing the Defendant to adopt a new Form 10-S that complies with the requirement of the NVRA. The NVRA specifically provides:

> **(2)** A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:
>
> > **(A)** If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for

> Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.
>
> **(B)** If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

52 U.S.C. § 20507(d)(2).

After Plaintiffs brought this issue to the attention of the Secretary of State, he has made changes to Form 10-S so that it is now in compliance with the requirements of the NVRA. (*See* Doc. 38-18, Ex. Q to Def.'s 1st Br., (the "Revised Notice")). The Revised Notice has been promulgated by Secretary Husted in the form of emails to each of Ohio's county boards of elections and it is posted on the Secretary of State's website. (*See* Doc. 56-2, Ex. B to Def.'s 3d Br., Website Screen Shots and Emails). Defendant represents that the Revised Notice will be used in the 2016 list maintenance procedure. Defendant asserts that as a government official, his change in the procedure is entitled to deference, relying on *Mosley v. Harrison*, 920 F.2d 409, 415 (6th Cir. 1990) (holding that, in the context of mootness, a change in procedure made by a public official is entitled to greater deference than a change by a private entity). Defendant therefore argues that Count II of Plaintiffs' Amended Complaint is now moot.

Plaintiffs dispute that their claim is now moot on the basis that the old Form 10-S was in existence at the time the Complaint was filed. For voluntary

cessation to render a claim moot, "there [must be] no reasonable expectation that the wrong will be repeated." *Youngstown Publ'g Co. v. McKelvey*, 189 Fed. Appx. 402, 405 (6th Cir. 2006). Plaintiffs argue that even if the Revised Notice is adopted and used in the 2016 process, there is nothing preventing the Defendant from reverting back to the non-conforming Confirmation Notice in the future except court intervention. The Court does not agree. Defendant voluntarily made changes to Form 10-S upon receiving notice from Plaintiffs that it was not in compliance with the NVRA. Defendant has disseminated the Revised Notice and has stated as part of the record that the State plans to use this notice in the annual execution of the list maintenance procedures. There is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future.

*12 Finally, Plaintiffs argue that problems persist with the Revised Notice despite Secretary Husted's revisions. Specifically, Plaintiffs argue that the Revised Notice violates the NVRA because it fails to provide information about how a recipient can re-register if he/she has moved outside the state. (Doc. 57, Pls.' Reply, 20). Section (d)(2)(B) of the NVRA provides: "If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B).

Plaintiffs have raised this argument for the first time in their Reply brief despite being aware—prior to filing their Response—of the Revised Notice and

Defendant's position that the Revised Notice complied with the NVRA notice requirements. It is not proper for a party to raise a new argument in reply because the opposing party is not afforded with an opportunity to respond. As such, the Court is free to disregard this argument. *See Ross v. Choice Hotels Int'l, Inc.*, 882 F. Supp. 2d 951, 958 (S.D. Ohio 2012) (Frost, J.) ("This Court has explained time and again that 'a reply brief is not the proper place to raise an issue for the first time.' Consequently, the Court need not and will not consider [the new argument]." (citations omitted)).

Even if the argument were timely raised, it still fails. The NVRA does not specifically require states to control and/or instruct voters in other states. Section 20507 begins with "Each State shall . . . ." The protections of the NVRA exist to protect voters in their respective states to *continue* to vote within that State—not register in another state. It defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence. The Revised Notice gives *Ohio voters*—the only voters Ohio is obligated to provide notice to—several options to notify the Secretary of State of a change of address, including the opportunity to update the information online. Accordingly, the Revised Notice, Form 10-S, is therefore in compliance with the NVRA.

B. Irreparable Harm/Injury

Given that Plaintiffs have not substantially demonstrated a violation of the NVRA, the Court is unable to conclude that irreparable harm has been

established for purposes of issuing a preliminary and/or permanent injunction.

C. Harm to Others

Again, since there has been no violation of the NVRA, there will be no harm to others in continuing to maintain the voter registration rolls in accordance with the NVRA.

D. Public Interest

The Court finds that the public interest is being served by Ohio's voter maintenance procedures and will continue to be served as long as Ohio continues to operate in compliance with the NVRA. The purposes of the NVRA include: "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. Therefore, Ohio's procedures of maintaining the voter registration rolls ensure the integrity of the election process.

Accordingly, after examining the preliminary and permanent injunction factors together, the Court concludes that injunctive relief is not warranted in this instance. This decision disposes of all of Plaintiff's claims and effectuates the desire of the parties—that is, it renders the Court's final decision on the merits of the case. The parties have agreed that a final, expedient decision is in the best interest of all involved in light of the looming November election. The Court believes this order provides exactly that.

IV. CONCLUSION

*13 Based on the foregoing, Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or,

in the alternative, Preliminary Injunction is DENIED. Having found that Plaintiffs' claims are not meritorious, there is no just reason to delay and therefore, final judgment shall be entered in favor of Defendant.

The Clerk of this Court shall remove Documents 9 and 39 from the Court's pending motions list and terminate this case.

IT IS SO ORDERED.

APPENDIX C

2016 WL 6093371
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Ohio A. Phillip Randolph Institute, et al.,
Plaintiffs,

v.

Jon Husted, Ohio Secretary of State, Defendant.

Case No. 2:16-cv-303

Filed 10/19/2016

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OPINION AND ORDER

GEORGE C. SMITH, JUDGE

*1 This matter is before the Court on Defendant's Motion to Implement Remedy (Doc. 72) and Plaintiffs' Motion for Temporary Restraining Order

and Motion for an Order to Show Cause (Doc. 74). The Court ordered expedited briefing on the Motions and they are now ripe for review.[1] After careful review of the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** both Defendant's Motion to Implement Remedy and Plaintiffs' Motion for Temporary Restraining Order.

I. BACKGROUND

The Court has previously set forth the background in this case in detail in its June 29, 2016 Opinion and Order on the merits briefing. (*See* Doc. 66). At issue in this case is a challenge to Ohio's Supplemental process, which has been used by Jon Husted, the Ohio Secretary of State ("Secretary Husted" or the "Secretary of State") as a supplement to the National Change of Address program ("NCOA"), targeting voters who changed addresses but failed to notify the United States Postal Service. Plaintiffs challenged the Ohio Supplemental Process as a violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 *et seq*. This Court held that the Ohio Supplemental Process did not violate the National Voter Registration Act. (*See* Doc. 66, Opinion and Order). However, the Sixth Circuit reversed and remanded this Court's decision, finding that the Ohio Supplemental Process is illegal under the NVRA. *A. Philip Randolph Institute v. Jon*

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[1] Amicus, the Ohio Democratic Party, and interested party, the United States, have both filed briefs regarding their opinions of the appropriate remedy in this case. The briefs suggest that the relief sought by the parties is not sufficient and the Court should reinstate all voters who have ever been removed pursuant to Ohio's Supplemental Process.

Husted, ___ F.3d ___, 2016 WL 5328160, at *8 (6th Cir. Sept. 23, 2016).

In an attempt to comply with the Sixth Circuit decision, the Secretary of State filed a Motion to Implement Remedy which includes a proposed Directive setting forth the process that Defendant believes reflects the remedy Plaintiffs sought in their Complaint and allows individuals removed from the registration roll through the 2015 Supplemental Process to vote assuming certain qualifications are met. Plaintiffs have also moved this Court for a Second Temporary Restraining Order requesting the Court order the Secretary of State to issue a Directive to count all provisional ballots cast in the 2016 General Election by voters whose registrations were cancelled pursuant to Ohio's Supplemental Process in 2011, 2013, or 2015. (Doc. 74, TRO at 2). Plaintiffs also request immediate relief to ensure that absentee ballot requests by voters purged pursuant to Ohio's Supplemental Process are not rejected.

II. STANDARD OF REVIEW

Rule 65(b) of the Federal Rules of Civil Procedure permits a party to seek injunctive relief to prevent immediate and irreparable injury. A temporary restraining order is an extraordinary remedy whose purpose is to preserve the status quo. *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). The burden of proving that the circumstances "clearly demand" such an extraordinary remedy is a heavy one: "[t]he party seeking the injunction must establish its case by clear and convincing evidence." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566,

573 (6th Cir. 2002); *Honeywell v. Brewer-Garrett Co.*, 145 F.3d 1331 (6th Cir. 1998).

***2** The factors considered in granting a temporary restraining order or a preliminary injunction are similar in nature. In the Sixth Circuit, it is well-settled that the following factors are to be considered in determining whether a temporary restraining order is necessary:

> (1) whether the movant has a strong or substantial likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the relief requested; (3) whether issuance of the injunction will cause substantial harm to others; and (4) whether the public interest will be served by issuance of the injunction.

Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 432 (6th Cir. 2004). The factors are not prerequisites; rather, they must be balanced. *Capobianco, D.C. v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004); *see also Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (no single factor is determinative). The decision whether or not to issue a preliminary injunction falls within the sound discretion of the district court. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982).

III. DISCUSSION

As set forth above, the Sixth Circuit held, without qualification, that "Ohio's Supplemental Process violates Section 8, subsection (b)(2) of the NVRA." *A. Philip Randolph Institute v. Jon Husted*, ___ F.3d ____, 2016 WL 5328160, at *8 (6th Cir. Sept. 23,

2016). Therefore, the Sixth Circuit remanded this case for further proceedings consistent with their opinion.

With the 2016 Election Day looming and early voting already underway, the Court finds itself in a difficult position. The Sixth Circuit's decision held that a process overseen for over 22 years by multiple Ohio Secretaries of State—from both major political parties—was unlawful. Now, with fewer than 20 days until the election, this Court is faced with the task of crafting and ordering the implementation of a remedy that restores the rights of as many disenfranchised voters as possible without placing an undue burden on election officials, fundamentally changing the State's voting processes, or making room for abuse of those same processes. Given the time constraints and complexity of the logistical hurdles now faced by Secretary Husted and Ohio's 88 county boards of elections, it is unlikely that any remedy will be perfect. That being said, the parties agree on several key issues and the Court is confident that there are additional, manageable remedial measures that state and county officials can undertake prior to the election. Despite the imperfect circumstances now faced by the parties and Ohio voters purged under Ohio's Supplemental Process, it is the Court's hope that the remedies detailed in this Opinion and Order will successfully restore the rights of many Ohio voters prior to the upcoming election.

The Secretary of State has ended the Supplemental Process and therefore going forward, is no longer in violation of the NVRA. Despite arguing that the Eleventh Amendment bars an

injunction against a state when there is no allegation of "an ongoing violation of federal law", the Secretary of State has still proposed a Directive that would allow unlawfully purged voters to vote in the 2016 General Election. (Doc. 80, Def.'s Mem. Opp. at 6, (citing *Deuel v. Dalton*, No. 3:11-cv-466, 2012 WL 1155208, *6 (M.D. Tenn. Apr. 4, 2012))). The Eleventh Amendment does not bar the relief sought in this case. Although Secretary Husted has stopped using the Ohio Supplemental Process going forward, the Sixth Circuit determined that the past use of the Ohio Supplemental Process was unlawful and that some qualified electors were illegally removed from the voter rolls. If those who were unlawfully removed from the voter rolls are not allowed to vote, then the Secretary of State is continuing to disenfranchise voters in violation of federal law. Under *Ex Parte Young*, the Court has the power to design a remedy that ends continuing violations of federal law in cases such as this. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)). Accordingly, at this stage, the Court finds that the Eleventh Amendment does not bar the relief sought in the TRO.

*3 The parties agree that Plaintiffs have succeeded on the merits of their NVRA claim and that voters were unlawfully removed from Ohio's voter registration rolls pursuant to Ohio's Supplemental Process, justifying the need for injunctive relief. Both parties have submitted their proposed remedies agreeing that immediate relief is required to ensure that voters who were unlawfully removed are permitted to vote in the 2016 General Election because voting is already underway; however, they disagree as to the scope of the relief.

There is no dispute that the remedy ordered by this Court will not involve the reinstatement of all voters who have been removed from the voter registration rolls.[2] But it will allow voters who have been illegally removed to cast a provisional ballot and the Court will set forth the procedure for validating and counting those provisional ballots. The following issues remain in dispute and will be addressed in turn.

A. Confirming Voters Removed from Ohio's Supplemental Process

The Secretary of State proposed the following relief:

> For purposes of the November 8, 2016 General Election . . . a provisional ballot cast during the in-person absentee voting period or on Election Day by a voter who is not registered to vote in the State of Ohio may be counted if all of the following apply:
>
> 1. The individual's voter registration was cancelled in 2015 (confirmation card mailed in 2011) pursuant to the Supplemental Process;
>
> 2. The voter's provisional ballot affirmation reflects the same address at which the voter was

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[2] The Ohio Democratic Party and the United States are seeking this exact relief. However, such broad reinstatement has not been requested as relief in this case and would be difficult to accomplish prior to the 2016 General Election, especially since early voting is already underway. Rather, the better way to ensure that any unlawfully removed voters are able to vote is to allow them to cast a provisional ballot that can be validated up to 30 days after the election.

last registered to vote in the State of Ohio at the time of cancellation;

3. The board of elections does not have information that the voter was deceased, incarcerated on a felony conviction, or adjudicated incompetent under Ohio law by a county probate court after the individual's registration record was cancelled; and,

4. The voter's provisional ballot affirmation form and the ballot otherwise comply with all applicable laws and directives.

(Doc. 72-1, Proposed Directive).

Plaintiffs propose that all voters purged pursuant to Ohio's Supplemental Process in 2011, 2013, and 2015, should be counted if the other conditions apply. Plaintiffs also provide more specific details with respect to condition three set forth above, which include:

> the individual does not appear on a list of (i) deceased voters provided by the state department of health or by the State and Territorial Exchange of Vital Events ("STEVE") database, (ii) individuals incarcerated on a felony conviction provided by an Ohio clerk of court or a federal district court, or (iii) voters adjudicated as incompetent under Ohio law by a county probate court, where the relevant event (i.e., death, incarceration, adjudication of incompetence) occurred after the individual's registration record was cancelled;

(Doc. 74-1, Proposed TRO at 5).

The Secretary of State responds that "Plaintiffs' demand would be burdensome and raises questions about reliability and uniformity." (Doc. 80, Def.'s Mem. Opp. at 15). Further, the Secretary of State submits declarations of election officials in support of his argument that some boards of elections' databases identify whether a name was removed from the registration roll under the Supplemental Process, while others do not. (*Id.* (citing Damschroder Dec. at ¶ 29; Shubat Dec. at ¶ 10)). For the boards of elections that do not have that capability, they can contact the Secretary of State who can compare the name against the state-wide NCOAs list from previous years, and if not on that list, the presumption would be that the name was removed pursuant to the Supplemental Process. Then, other checks would need to be performed to ensure the person is not deceased, incarcerated on a felony conviction, or ruled incompetent.[3]

*4 Additionally, the Secretary of State argues that the lists compiled prior to 2011 may be unreliable because they were prepared by previous administrations. Finally, the Secretary of State argues that extending the procedure of validating provisional ballots beyond those removed pursuant to Ohio's Supplemental Process in 2015,—*i.e.*, counting provisional ballots for those voters purged in 2013

---

[3] The Secretary of State makes an important point, that "[e]ven those counties that can identify whether a name was removed through the Supplemental Process will still need to do those verifications..." Because "once a name is removed from the registration roll, in most counties, lists are not updated with subsequent events such as death." (Doc. 80, Def.'s Memo. in Opp. at 23 (citing Damschroder Dec. at ¶ 23; Shubat Dec. at ¶ 9)).

and 2011—would create a risk of non-uniformity because some counties may be able to effectively verify which voters were removed in 2013 and 2011 while others may not.

The Court is concerned with the lack of reliable records in some of the county boards of elections. (*See* Doc. 80-7, Billing Decl. at ¶ 10 ("my county is not able to distinguish between individuals cancelled pursuant to the Supplemental Process and NCOA Process")). However, the alternative could possibly deny voters of their right to vote. The Court finds that the county boards of elections are already required to provide any individual who appears to vote and whose name does not appear on the voter registration rolls with a provisional ballot. Therefore, the county boards of elections are already required to determine whether each person casting a provisional ballot is qualified to vote. *See* Ohio Rev. Code § 3505.182. As part of this confirmation process, the county boards of elections will have an additional step of determining whether the person casting the provisional ballot was removed from the voter registration rolls pursuant to the Supplemental Process of 2011, 2013, or 2015. If the individual county boards of elections can confirm that the voter was removed pursuant to the Supplemental Process of 2011, 2013, or 2015, and the voter's information is the same as when he/she was purged or has moved within the same county as set forth below, then the provisional ballot must be counted, assuming the voter was not removed as deceased, incarcerated on a felony conviction, or ruled incompetent.

Therefore, the Court adopts the Secretary of State's proposed Directive with the following

changes: As to the APRI Exception on page 1, change the first paragraph to: "The individual's voter registration was cancelled in 2011, 2013, or 2015 pursuant to the Supplemental Process." As to section d. of the Instructions on page 2, change the date of cancellation to 2011 and if date of cancellation is after January 1, 2011, proceed to "step e" below. The Court finds that the Secretary of State's proposal for verification under the Statewide Voter Registration Database ("SWVRD") to determine whether a voter's registration has been cancelled if deceased, incarcerated, or incompetent is sufficient and it is not necessary to add the additional language proposed by Plaintiffs with respect to the STEVE database, etc.

The aforementioned findings apply to the scope of review of voters purged pursuant to the Supplemental Process. The remaining disputed issues are set forth below. Further, a final Temporary Restraining Order and Preliminary Injunction will be set forth in the conclusion of this Opinion and Order so as to avoid any confusion.

B. Absentee Ballot Requests

Plaintiffs argue that people who were unlawfully purged pursuant to Ohio's Supplemental process may have mailed in absentee ballot requests. And, because Ohio does not send unregistered voters absentee ballots, these people will be deprived of their right to vote by mail-in absentee. Plaintiffs request that the Secretary of State and the respective county boards of elections mail provisional ballots in response to an absentee ballot request from an unregistered voter. Plaintiffs also ask the Court to order the Secretary of State to "add a column on

its 'Provisional Supplemental Report' stating the number of individuals in each county who had [mail-in absentee] provisional ballots counted . . . ." (Doc. 74-1, Plfs.' Proposed TRO at 7).

*5 The Secretary of State responds that Plaintiffs' requested relief is not narrowly tailored or easily administered. The Secretary of State argues that sending a provisional ballot via the mail in response to an absentee ballot request from an unregistered voter has never occurred in Ohio and is contrary to Ohio law. Ohio law provides for in-person provisional ballots pursuant to Ohio Revised Code sections 3505.18 through 3505.183. There is a single, limited exception that allows for the mailing of a provisional ballot. Under Ohio Revised Code section 3503.16(G), a voter may receive a mailed provisional ballot if they are entitled to cast a provisional ballot pursuant to other subsections, and that person is disabled or confined.

The Court finds that based on the information submitted by the Secretary of State, that allowing voters to request, receive, and submit a provisional mail-in absentee ballot would fundamentally change Ohio's election procedures. Additionally, the Court finds that to impose such a remedy at this time would be unduly burdensome on the Secretary of State. Specifically, Assistant Secretary of State Matthew W. Damschroder states in his declaration:

> Provisional ballot envelopes are generally 9 inches by 12 inches – much larger than a traditional absentee ballot identification envelope designed to fit inside of a "letter rate" return envelope. As such, boards would not have on hand carrier envelopes intended to

> deliver the provisional envelope, a ballot, and a courtesy reply envelope large enough for the voter to enclose his or her provisional envelope. Further, boards would need to immediately print additional provisional ballots and prepare instructions to include with the provisional ballot mailing to inform voters why they are receiving a provisional ballot by mail. This provisional ballot mailing may be especially confusing to voters who have already received a notice of an absentee ballot deficiency from the county board of elections. After all, the early voting period has begun, and boards are processing absentee ballot applications. While the Secretary issued a Directive on Friday pursuant to this Court's Order in the above-captioned case instructing county boards to not reject absentee ballot applications due to lack of voter registration, some notices regarding absentee ballot deficiencies likely were already issued. Finally, the postage required of a voter to affix to the larger envelope in order to return a provisional ballot by mail would be significantly more than the cost to return and absentee ballot by mail.

(Doc. 80-1, Damschroder Decl. at ¶ 32). The Court finds that sending provisional ballots by mail would be undu'y burdensome on the Secretary of State.

Finally, courts have questioned and cautioned other courts in becoming involved in the minutiae of processes reserved for the states, such as the election process. Specifically in *Ohio Democratic Party v. Husted*, No. 16-3561, slip op. at 2 (6th Cir. Aug. 24,

2016), the Sixth Circuit stated that this was yet another appeal "asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." In *Lewis v. Casey*, 518 U.S. 343, 362 (1996), the United States Supreme Court also questioned courts becoming "unmeshed in the minutiae" of state prison operations and suggested "adequate consideration to the views" of state officials. Accordingly, the Court finds the state election officials' statements regarding sending provisional ballots by mail to be persuasive and **DENIES** such a remedy in this case. Because the Court is not ordering the use of mail-in absentee provisional ballots, the Court **DENIES** Plaintiffs request to order the Secretary of State to alter the Provisional Supplemental Report to account for mail-in absentee provisional ballots.

***6** Currently, pursuant to the Court's October 14, 2016 Order, the Secretary of State has issued Directive 2016-37 instructing all county boards of elections not to reject any absentee ballot applications, whether received by mail or in person until further instructions are provided by the Secretary of State. However, according to the Secretary of State's responsive pleading, there are absentee ballot requests that have already been processed and denied. There is no practical way for Secretary Husted to remedy that. However, as for the applications that have not been processed or were rejected, but not sent notifications to date, the Secretary of State shall include in the notification of denial to any nonregistered voters that they may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on

Election Day at the correct polling place for the voter's current address. This will ensure that all unregistered voters who requested an absentee ballot by mail will not be denied the opportunity to vote and can cast a provisional ballot early or on Election Day.

C. Change of Address within Same County

Another point of contention between the parties centers around whether voters who were purged by the Supplemental Process must currently reside at the same address they did when they were unlawfully removed from the voter rolls in order for their in-person provisional ballot to be counted. The Secretary of State proposed that provisional ballots should only be counted for previously purged voters who still reside at the same address they did when they were purged pursuant to the Supplemental Process. (Doc. 72, Mot. to Impl. at 2; Doc. 72-1, proposed Directive at 1). Secretary Husted notes that this remedy mirrors what Plaintiffs previously requested. Conversely, Plaintiffs request that purges voters' provisional ballots be counted even if they have moved residences within their county since the time they were purged from the voter rolls. (Doc. 74-1, Pls.' Proposed TRO at 4-5). Plaintiffs note that their earlier requests for a remedy similar to Secretary Husted's proposed remedy were premised on Secretary Husted's representations that there was no other way to identify the purged voters, but evidence has since come to light to nullify that position. (Doc. 74, TRO Mot. at 3, n.1).

Ohio Revised Code § 3503.16 sets forth the requirements for voters who change residences or names. In general, a voter must report a change of

address regardless of whether they are moving intra-precinct, intra-county, or intra-state. Ohio Rev. Code § 3503.16(A). If a registered voter moves to a new residence within the same precinct in which he or she previously resided but fails to file a change of address form, they are not precluded from casting a regular ballot in person. Said voters are still able to appear at their assigned polling location, provide one of the accepted forms of identification confirmation, and cast a regular ballot. Ohio Rev. Code §§ 3503.16(A) and (B)(1)(a).

This scenario, of course, does not take into consideration that the voter may have been unlawfully purged in the interim. In light of the current state of affairs, poll workers have no immediate way of cross-checking the voter's new address with their prior address if they have been purged from the voter rolls. Recognizing this reality, Plaintiffs have requested that purged voters who move intra-precinct be treated the same as voters who move to a different precinct within the same county. The Court agrees with Plaintiffs that equal treatment for all purged voters who moved within their county since their cancellation—regardless of whether they stayed in their same precinct—is the only workable solution.

Under Ohio law, a registered voter who moves to a new precinct within the same county is also not barred from casting a ballot simply because they failed to submit a change of address form. Under these facts, a voter may cast a provisional ballot by appearing at an appropriate polling location for the precinct in which the person resides, completing and signing the written affirmation on the provisional

ballot envelope (which serves as a notice of change of residence), and completing and signing a statement attesting that the registered elector moved and has voted a provisional ballot. Ohio Rev. Code § 3503.16(B)(2)(a)-(d). It is worth nothing that the written ballot affirmation ("Form No. 12-B"), as described in Ohio Revised Code § 3505.182, requests the same information and identification verification as the standard "Voter Registration and Information Update Form" that is widely available. Specifically, Form No. 12-B requires a provisional voter to provider their full name, date of birth, current address, former address (optional), and Ohio driver's license number, state identification card number, or the last four digits of their Social Security number. Form No. 12-B also requires a sworn affirmation and signature. In short, Form No. 12-B provides election officials with the same safeguards and information that a normal voter's registration form would include. Accordingly, by requiring election officials to tabulate these provisional ballots, the Court finds no undue burden on election officials nor does the Court find any increased risk for abuse of the voting process.

*7 In light of the Sixth Circuit's holding that Secretary Husted—by way of the Supplemental Process—unlawfully removed voters from the state's voter rolls, the Court finds Secretary Husted's proposed remedy untenable. If the Court were to accept the position that provisional ballots need only be counted for voters who currently reside at the same address they did when they were purged, voters who have moved intra-precinct or intra-county would be denied rights that they would have enjoyed had they not been unlawfully purged under the

Supplemental Process. In short, these voters should still be able to cast a provisional ballot and have it be counted if they are able to comply with the additional requirements set forth in Ohio Revised Code § 3503.16 *et seq.*, despite the fact that they have moved residences.

As noted above in Section II.A., if a voter appears at her proper polling location and her name does not appear in the voter rolls, she may cast a provisional ballot. In the weeks following the election, her county board of elections will check their past voter rolls to determine if she was registered to vote in that county at the time of her cancellation. If so, the board shall determine if she falls within the APRI Exception as set forth in Secretary Husted's proposed Directive 2016-XX (as modified by this Opinion and Order). If the board of elections does not have any information indicating that she was deceased, incarcerated on a felony conviction, or adjudicated incompetent, and it is determined that she was not lawfully purged from the voter rolls through the NCOA process, there is a presumption that she was unlawfully purged pursuant to the Supplemental Process and her provisional ballot should be counted. If a board does not possess the information to determine whether she was purged under the NCOA Process or the Supplemental Process, then the board must contact the appropriate Secretary of State's elections counsel, which will then make a determination after checking past NCOA lists. With the information before it, the Court does not think this process places an undue burden on the county boards of elections of the Secretary of State. Accordingly, the Court hereby **ORDERS** that all such votes be counted provided there is no

independent basis which otherwise would render those votes void. The Court also notes that there is a strong likelihood that voters not currently in the voter rolls have been lawfully removed as a result of the NCOA Process.

D. Additional Communications to Voters

Plaintiffs have requested that this Court order the Secretary of State to communicate to prospective voters regarding the voters' ability to vote provisionally should the voter believe they are not registered to vote. The Secretary of State did not specifically address Plaintiffs' request for changes to the Secretary of State's website or the requests regarding telephonic and online assistance to voters. However, the Secretary of State objects to Plaintiffs' request that the Secretary of State take out advertising efforts to inform voters that they may vote provisionally. The Court will address each below.

1. Website Alterations

Plaintiffs request that new language be added to the "MyOhioVote.com" and "http://voterlookup .sos.state.oh.us" webpages of the Secretary of State containing the online "Voter Lookup" tool. Plaintiffs request that the following language be added:

> If you are unable to locate your voter registration information but think you are registered to vote, and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot either during in-person absentee voting period or at the correct polling place for your current address that may be counted pursuant to court

> order. To find your polling place, please click here or call your county board of elections.

*8 (Doc. 74-1, Pls.' Proposed TRO at 7). Additionally, Plaintiffs' Proposed TRO calls for a hyperlink be placed on the words "pursuant to court order" and that "[t]he phrase 'click here' will be a hyperlink to the online [polling location locator] resource. The phrase 'call your county board of elections' will be a hyperlink to a list of the phone numbers of all of Ohio's 88 county boards of elections." (*Id.*) Last, Plaintiffs request that the Secretary of State direct each county that operates its own online voter lookup tool to add the language described above, including the hyperlinks, to the webpage containing that tool." (*Id.*)

The voter lookup tool currently presents the following statement when a search query returns no results:

> We could not locate your voter registration with the information you provided. Please double check your entries below. If you have entered the correct information in the correct fields, we encourage you to check your registration status by contacting your local county board of elections. Click here for a full listing of Boards of Elections.

Voter Search, *My Voter Information*, Ohio Secretary of State, http://voterlookup.sos.state.oh.us/voterlookup.aspx (last visited October 18, 2016). The Court finds that a remedy similar to that suggested by the Plaintiffs is not unduly burdensome on the Secretary of State and will properly assist voters with finding the proper polling place and casting a provisional ballot if their registration was

cancelled. Further, the Court agrees with Plaintiffs that if a county operates a voter lookup tool, the county should offer some directions to a voter who believes they are registered but receives no results in response to a query. However, the Court also recognizes the reality that all counties who operate a voter lookup tool may not have the staffing or time necessary to make the changes requested by Plaintiffs.

Accordingly, the Secretary of State is **ORDERED** to change the language in the voter lookup tools "MyOhioVote.com" and "http://voterlookup.sos.state.oh.us" webpages of the Secretary of State to the following when the tool fails to pull up a voter's registration:

> We could not locate your voter registration with the information you provided. Please double check your entries below. If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

(Doc. 74-1, Pls.' Proposed TRO at 8). The phrase "please click here" will be a hyperlink to the online "Voter Toolkit" which contains an option for "Find My Polling Location." *Voter Toolkit*, Secretary of State, https://www.sos.state.oh.us/SOS/Upload/sites/ballotTracking/ballotTracking.aspx?page=20547 (last visited October 18, 2016). The phrase "Click here for a full listing of Boards of Elections" will continue to be a hyperlink to a list of the contact information of all of Ohio's 88 county boards of elections. The Secretary of State shall also add the following phrase to all result pages in the voter lookup tool in the event that the tool provides other properly registered voters but not the voter who conducted the search:

> ***9** If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

This notice shall have the same hyperlinks as the notice above.

The Secretary of State will also direct all counties which operate their own voter lookup tools to add the

language and hyperlinks noted above to the extent possible given the noted time and staffing constraints. Last the Court **DENIES** Plaintiffs' request to require the Secretary of State to "continue to provide online and telephonic resources in response to voter inquiries to assist voters in determining the correct polling location and precinct for their address." As Plaintiffs admit that this is already occurring, there is no need for such an order.

2. Advertising and Promotion Efforts

Plaintiffs' final request is that the Court orders Secretary Husted to:

> undertake additional efforts to inform and educate the public concerning how voters whose registrations were cancelled under the Supplemental Process may participate in the November 2016 General Election, including making public service announcements via television, radio, and social media, and posting information on the Secretary's web site.

(Doc. 74-1, Pls.' Proposed TRO at 8). The Secretary of State asserts that this would be impracticable due to time constraints, costs, and the requirements with which the Secretary of State must comply to purchase advertising, to employ advertising firms and those necessary to produce such advertisements. Secretary Husted notes that the Controlling Board would have to approve the costs at a meeting for which the application deadline has already passed and that an advertising buy in September cost approximately $550,000.

The Court agrees with the Secretary of State that the requested relief is impracticable in the time that

is currently remaining before the election. Plaintiffs' motion and Proposed Temporary Restraining Order offer no justification for the necessity of this relief or how the relief requested is narrowly tailored to the address the harm in this case. As Plaintiffs have noted in earlier motions before the Court, the primary concern is that "many cancelled voters will show up to vote in the November 2016 General Election, only to be told they are unregistered and therefore unable to vote." (Doc. 9, Mot. Prelim. Inj. at 21; *see also* Doc. 9-4, Harmon Decl. at ¶ 8 (found out he was not registered upon arrival at the polling location); Doc. 9-5, McCullough Decl. at ¶ 11 (same)). Plaintiffs' proposed relief offers no benefit to the harm alleged. Voters who believe they are registered will show up on Election Day and be allowed to cast a provisional ballot under the relief granted. Accordingly, Plaintiffs' request for the Secretary of State to conduct an advertising campaign is **DENIED**.

IV. CONCLUSION

Based on the foregoing, Defendant's Motion to Implement Remedy and Plaintiffs' Second Motion for Temporary Restraining Order are **GRANTED IN PART** and **DENIED IN PART**. The Court finds that the aforementioned remedies are in accord with the Sixth Circuit's decision in *A. Philip Randolph Inst.*, 2016 WL 5328160 and the purposes of the NVRA, which include: "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501.

***10** The Secretary of State is hereby **ORDERED** to issue a directive no later than Friday, October 21,

2016 in a form substantially similar to the language below. The Court approves of any formatting changes deemed appropriate by the Secretary of State so long as they do not substantively alter the Court's approved language. The following Temporary Restraining Order and Preliminary Injunction shall remain in effect through the November 8, 2016 General Election and subsequent tabulation period:

PURPOSE

For purposes of the November 8, 2016 General Election, a provisional ballot cast during the in-person absentee voting period or on Election day by a voter who is not registered to vote in the State of Ohio may be counted if all of the following apply (the "*APRI* Exception"):

1. The individual's voter registration was cancelled in 2011, 2013, or 2015 (confirmation card mailed in 2007, 2009, or 2011) pursuant to the Supplemental Process;

2. The voter's provisional ballot affirmation reflects an address within that precinct and the voter was previously registered to vote within that same county prior to cancellation;

3. The board of elections does not have information that the voter was deceased, incarcerated on a felony conviction, or adjudicated as incompetent under Ohio law by a county probate court after the individual's registration record was cancelled; and,

4. The voter's provisional ballot affirmation form and the ballot otherwise comply with all applicable laws and directives.

INSTRUCTIONS

Boards must apply the *APRI* Exception to the provisional ballot eligibility determination of any provisional voter who is not registered to vote in the State of Ohio at least 30 days before the election. If the board determines, as evidenced by the voter having a "cancelled" status in the Statewide Voter Registration Database (SWVRD), that the voter previously was registered to vote in the State of Ohio, it must count the provisional ballot using the following steps in conjunction with the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual:

a. Identify the most recent address of registration in the Statewide Voter File for the voter (because merged records can result in multiple records for a single voter, it is necessary to identify the most recent address of registration on file prior to cancellation). Proceed to "step b" below.

b. If the most recent address of registration in the Statewide Voter File for the voter is in a different county than the address provided by the voter on the provisional affirmation, the board must reject the provisional ballot. If the most recent address of registration in the Statewide Voter File for the voter is the same as the address provided by the voter on the provisional affirmation or is in the same county, proceed to "step c" below.

c. Identify the "reason" code in the SWVRD. If the reason code is "Cancelled – Deceased," "Cancelled – Incompetent," or "Cancelled – Incarcerated" the board must reject the provisional ballot. (A "merged" record is not a

"cancelled" record.) If the reason code is something other than death, adjudication of incompetency by a probate judge, or incarceration on a felony conviction, proceed to "step d" below.

d. Identify the date of cancellation in the SWVRD. If the date of cancellation is prior to 2011, the board must reject the provisional ballot. If the date of cancellation in the SWVRD is after January 1, 2011, proceed to "step e" below.

*11 e. Determine if the voter was cancelled under the "Supplemental Process" of the state's general voter records maintenance program.

If the board's records do not differentiate between a cancellation under the "NCOA Process" and a cancellation under the "Supplemental Process," the board must contact the Secretary of State's elections counsel assigned to its county. The Secretary of State's elections counsel will compare the information from the voter's provisional ballot affirmation to the NCOA list from the year in which the voter was sent a confirmation notice (four years prior to the year of cancellation).

The Secretary's Office shall possess the NCOA lists from 2007, 2009, and 2011. A county seeking to determine whether an individual is on the NCOA list in accordance with subsection (b) above shall contact the Secretary's Office, which shall provide the county with a prompt response.

The provisional ballot of a voter whose registration was cancelled under the "NCOA Process" cannot be counted under the *APRI* Exception. If the

voter's registration was cancelled under the "NCOA Process," the board must reject the provisional ballot.

The provisional ballot of a voter whose registration was cancelled under the "Supplemental Process" must be counted under the *APRI* Exception if the provisional ballot affirmation and the provisional ballot otherwise comply with all applicable laws, as directed in the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual.

ADDITIONAL INSTRUCTIONS

• The board must provide ballots and envelopes in the quantity of at least 15 percent more than the number of provisional ballots cast in that precinct at the 2008 or 2012 Presidential General Election, whichever is higher.[4] Additionally, each board must provide to each precinct and/or polling location a stock of provisional ballot affirmation envelopes (containing Secretary of State Form 12-B) that is greater than the number of provisional ballots being provided for this election. Be mindful of the proper allocation of ballot and envelope quantities across precinct splits. Additionally, any multi-precinct polling location must have a sufficient supply of Secretary of State Form 12-D.[5]

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[4] This is a minimum requirement for preparedness, not a prediction for the number of provisional ballots expected to be cast this election or as a result of the APRI Exception.

[5] For all information relative to ballot quantities for the November 8, 2016 presidential general election, *see* Directive 2016-35.

• Boards of elections will be required to provide the total count of provisional ballots counted using the APRI Exception separate from all other counted provisional ballots when the board submits its supplemental report at the conclusion of the official canvass following Election Day.

• Boards of elections are required to add the following language to any web tool used to aid voters in searching for their registration information:

> o If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

*12 • With respect to absentee ballot request forms, submitted in person or by mail, that have not already been processed and/or rejected by the Secretary of State and the respective boards of elections, the following language shall be included in the notification

of denial of the request for absentee voter to any nonregistered voter:

> o You may still case a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address.

Following the Court's Order permitting Defendant to file a reply brief, Plaintiffs filed a Motion to Withdraw their reply, which is **DENIED as moot**. Additionally, the Ohio Democratic Party's Motion for Leave to file its Amicus Curiae Brief is **GRANTED**. The Clerk of this Court shall remove Documents 72, 74, 78, and 86 from the Court's pending motions list. The parties shall submit a Joint Proposed Scheduling Order following the 2016 General Election regarding final merits briefing on the resolution of this case.

IT IS SO ORDERED.

APPENDIX D

52 U.S.C.A. § 20507
Formerly cited as 42 U.S.C.A. § 1973gg-6

§ 20507. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not

returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to

an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the

identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

CREDIT(S)

(Pub.L. 103-31, § 8, May 20, 1993, 107 Stat. 82; Pub.L. 107-252, Title IX, § 903, Oct. 29, 2002, 116 Stat. 1728.)

APPENDIX E

52 U.S.C.A. § 21083
Formerly cited as 42 U.S.C.A. § 15483

§ 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after

October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that--

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause

(ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration

system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of Title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that

shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration

Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(ii) provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection

(b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003.

CREDIT(S)

(Pub.L. 107-252, Title III, § 303, Oct. 29, 2002, 116 Stat. 1708.)

RECORD AND BRIEFS

No. 16-980

FILED
MAR 31 2017
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SUPREME COURT, U.S.

In The Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, and LARRY HARMON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Does Ohio's "Supplemental Process" – a voter roll-maintenance process that relies solely on an individual's failure to vote during a two-year period to trigger a process to remove the individual from the voter rolls – violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507(b)(2), which prohibits any roll-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote"?

CORPORATE DISCLOSURE STATEMENT

Respondent Ohio A. Philip Randolph Institute has no parent company, and no publicly traded company owns 10% or more of its stock.

Respondent Northeast Ohio Coalition for the Homeless has no parent company, and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

This case involves a narrow issue of statutory construction that only one circuit has addressed: whether Ohio's unique "Supplemental Process" for eliminating registered voters from the rolls violates the National Voter Registration Act of 1993 ("NVRA"). Though Petitioner alleges that other states will be impacted by resolution of this question, the majority of those states have procedures entirely distinct from Ohio's Supplemental Process. And litigation in the handful of states with procedures similar to Ohio's has barely begun to percolate. Accordingly, Petitioner's claims of widespread impact are both exaggerated and premature. The Court should deny the petition for a writ of certiorari for these reasons alone.

Moreover, the decision below was correct. The NVRA prohibits any voter-list maintenance program for federal elections that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This provision reflects the basic principle that, just as every eligible voter has the constitutional right to vote, each one also has the right *not* to cast a vote – and the mere exercise of that right should not be the basis for removal from the voter rolls. Under the NVRA, one's failure to vote may play only a narrow and carefully circumscribed role: only after a state receives an independent and affirmative indication that a voter may have moved (such as a change of address filed with the U.S. Postal Service) does the NVRA permit a state to send the voter a notice and to remove the

voter for failing to respond and failing to vote during the two subsequent federal election cycles. *See generally id.* § 20507(a)-(d). In sum, a voter's failure to vote can be used only to confirm pre-existing evidence that the voter has moved, but it cannot itself be the reason why a voter is initially identified for removal from the rolls.

Under Ohio's "Supplemental Process," however, a voter's failure to vote during a mere two-year period – a single election cycle – is the trigger for a change-of-address confirmation process that results in the voter's removal from the registration list unless the voter takes affirmative action in the subsequent four-year period. Applying the plain language of the NVRA and settled canons of statutory construction, the Sixth Circuit correctly concluded that this "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Pet. App. at 24a (quoting 52 U.S.C. § 20507(b)(2)). Because of Ohio's flawed process, thousands of eligible Ohio voters would have been denied their fundamental right to vote in the November 2016 General Election absent the court's intervention. *See* Pet. at 14.

The Petitioner presents no sound basis for disturbing the Sixth Circuit's textual interpretation of the NVRA. Petitioner first claims that this case raises constitutional concerns because the Elections Clause of the U.S. Constitution, U.S. CONST. art. I, § 4, cl. 1, allows Congress to regulate only the time, place, and manner of federal elections and not a state's voting

qualifications. But in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013) ("*ITCA*"), this Court squarely reaffirmed that the NVRA's registration procedures fall within Congress's power under the Elections Clause, and in any case, neither Ohio nor any other state identified by Petitioner has established registration or frequent voting as voter qualifications.

Similarly unavailing is Petitioner's second argument that a provision in the later-enacted Help America Vote Act of 2002 ("HAVA"), amended the NVRA's requirements. 52 U.S.C. § 21083(a)(4)(A). In fact, Congress expressly specified that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* § 21145(a).

In any event, this case is a poor vehicle to address the question presented because it arises in an interlocutory posture. The Court should not review the case while lower court proceedings that could shed light on the questions raised are incomplete. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory Background

Congress passed the NVRA to combat what it found to be "discriminatory and unfair [state] registration laws and procedures" that "have a direct and damaging effect on voter participation in [federal]

elections." *Id.* § 20501(a)(3). It sought to replace the "complicated maze of local laws and procedures . . . through which eligible citizens had to navigate in order to exercise their right to vote" – procedures that were "in some cases as restrictive as the . . . practices" outlawed by the Voting Rights Act. H.R. REP. NO. 103-9, at *3 (1993). In regulating state registration laws and procedures for federal elections, Congress acted pursuant to its authority under the Elections Clause of the Constitution, which empowers Congress to displace state regulations concerning the "Times, Places, and Manner" of holding elections for federal office. U.S. CONST. art. I, § 4, cl. 1.

The NVRA prohibits any voter-list maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) ("Failure-to-Vote Clause"). In forbidding states from removing voters from the rolls "by reason of" their failure to vote, Congress sought to protect the right of citizens to choose when they vote, and not to punish them for exercising their right not to cast a ballot in a particular election. As the Senate Report explained, "while voting is a right, people have an equal right not to vote" and "eligible citizens [should not be required] to re-register when they have chosen not to exercise their vote." S. REP. NO. 103-6, at *17-18 (1993). The legislative history is replete with references to the unfairness of "penaliz[ing] . . . non-voters by removing their names from the voter registration rolls merely because they have

failed to cast a ballot in a recent election."[1] And Congress understood that the failure to vote does not mean that a voter has changed residence – given the sadly low turnout of American elections, that would suggest that half of the nation's voters change residence during every federal election cycle – which is clearly not the case. *See* S. REP. NO. 103-6, at *18.

Under the NVRA, failure to vote plays a very narrow role in the removal process; it serves solely as one component of a back-end procedure to *confirm* that a voter has changed residence, used only *after* the state has received an independent and affirmative indication that the voter has moved. The NVRA's model list-maintenance program, sometimes called the "safe

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[1] S. REP. NO. 103-6, at *17; *see also, e.g.*, *id.* at *2 (The NVRA "provide[s] procedures and standards regarding the maintenance [of registration rolls] to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction."); *id.* at *18 ("[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again."); H.R. REP. NO. 103-9, at *15 (expressing concern that state list-maintenance programs "may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing"). Congress was aware this practice had the effect, and in some cases the purpose, of reducing registration rates and, consequently, participation in federal elections. *E.g.*, H.R. REP. NO. 103-9, at *2 (identifying "annual reregistration requirements" as among "the techniques developed to discourage participation" around the turn of the twentieth century); S. REP. NO. 103-6, at *3 (same).

harbor," demonstrates how one's failure to vote can be part of the back-end confirmation process. As described in Section 8(c) of the NVRA, states may use information obtained from the U.S. Postal Service's National Change of Address ("NCOA") system, a database of individuals and businesses that have forwarding addresses on file with the Postal Service, to identify voters who may have moved out of the relevant voting district. *See* 52 U.S.C. § 20507(c)(1). Once a state has received NCOA information for a particular voter, the NVRA allows the state to initiate a procedure designed to confirm the address change. That confirmation process starts by the state mailing the voter a notice to which the voter may respond to confirm or correct the change-of-address information. The voter's registration may then be canceled only if the voter: (1) confirms a change in residence out of state or to a new jurisdiction within the state where the voter would need to re-register; or (2) fails to respond to the notice and fails to vote during the two subsequent federal election cycles. *Id.* § 20507(d)(1) ("Address-Confirmation Procedure").

In sum, failure to vote may play only a narrow role at the end of the NVRA removal process – as part of a carefully articulated procedure designed to *confirm* that a voter has changed residence *after* the state receives independent and affirmative information that the voter may have moved (such as from the Postal Service's NCOA system under the NVRA "safe harbor"). To be sure, states are not limited to using the NCOA system – other information affirmatively indicating a

change of address may be used to initiate the removal process. But by prohibiting removal of voters "by reason of" failure to vote, Congress expressly determined that mere failure to vote cannot *itself* be the reason for initiating the NVRA's Address-Confirmation Procedure. *See id.* § 20507(a)-(d).

With the passage of the Help America Vote Act of 2002 ("HAVA"), Congress required states to establish a computerized statewide voter-registration database, and mandated that the database be maintained in accordance with the procedures and requirements of the NVRA. *See id.* § 21083. The specific provision in HAVA that Petitioner claims superseded and altered the NVRA is Section 303(a)(4)(A), which provides that:

> The State election system shall include . . . [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

Id. § 21083(a)(4)(A). Importantly, Congress took pains to explain that this provision should not be read as altering the NVRA's prohibition on removal "by reason of" a failure to vote: Not only does Section 303 itself require that it be construed "consistent with the

[NVRA]," *id.*, but HAVA elsewhere provides that, with one exception not relevant here, "nothing in [Chapter 209, which includes Section 303,] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

HAVA also added an explanatory proviso (the "Except Clause"), clarifying that even though a voter's failure to vote generally "shall not result in the removal" of the voter's name from the rolls, there is a singular exception: when a state is using one's failure to vote as part of the Address-Confirmation Procedure described above. *Id.* § 20507(b)(2). Reading HAVA's provision in context makes this clear:

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that* nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual – (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared

> to vote in 2 or more consecutive general elections for Federal office.

Id. (emphasis added). By citing subsections (c) and (d), *id.* § 20507(c), (d) – *i.e.*, the provisions describing the NVRA "safe harbor" and the Address-Confirmation Procedure – the Except Clause simply sought to clarify that while the Failure-to-Vote Clause prohibits using failure to vote as the reason for initiating removal, it does not prohibit using failure to vote as a component of the very specific Address-Confirmation Procedure that occurs *after* a jurisdiction receives affirmative information indicating that a voter has changed residence. *See* Pub. L. No. 107-252, § 903 (2002) (headnote describing the amendment as a "[c]*larification* of [the] ability of election officials to remove registrants from [the] official list of voters on grounds of [a] change of residence") (emphasis added); *see also* H.R. REP. NO. 107-730, at 81 (2002) (Conf. Rep.) (noting that HAVA "leaves NVRA intact, and does not undermine it in any way" and that "[t]he procedures established by NVRA that guard against removal of eligible registrants remain in effect").

B. Ohio's Supplemental Process

This case only challenged a specific part of Ohio's process for voter-roll maintenance. In large part, Ohio's statutes adopt the NVRA's "safe harbor" provision, relying first on information from the U.S. Postal Service's NCOA system as evidence that a voter

has moved, and then tracking the NVRA's Address-Confirmation Procedure to cancel the voter's registration only if the voter fails to respond to a confirmation notice and fails to vote in the subsequent four years.

Ohio's statutes also permit – but do not require – the Secretary of State to promulgate additional list maintenance procedures. OHIO REV. CODE § 3501.05(Q)(1) (requiring the Secretary of State develop "[a] process for the removal of voters who have changed residence . . . including a program that uses the national change of address service provided by the United States postal system"). Under this authority, the Ohio Secretary of State has issued directives that establish a "Supplemental Process" in addition to the statutory safe harbor process.[2] Under this process, Ohio presumes that a two-year period of voter inactivity – *i.e.*, missing a single federal election cycle – indicates that the voter "may have moved."[3] Ohio thereby penalizes voters who decide not to vote, or are unable to do so, by initiating the Address-Confirmation Procedure – and then removing them if they take no further action beyond continuing not to vote.

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[2] *See* Damschroder Decl., RE38-2, PageID#294; *see also, e.g.*, Directive No. 2015-25, "Chapter 3: Voter Registration," § 1.11(f), at 3-70 (December 15, 2015) ("Directive No. 2015-25"), *available at* https://www.sos.state.oh.us/SOS/Upload/elections/directives/2015/Dir2015-25_EOM-CH_03.pdf. Similar directives have been issued biennially or, in recent years, annually since 1994. Damschroder Decl., RE38-2, PageID#294.

[3] *See, e.g.*, Directive No. 2015-25, at 3-71.

C. The Proceedings Below

On April 6, 2016, after having notified the Petitioner Secretary of State that Ohio's Supplemental Process violates Section 8 of the NVRA, Respondents filed suit in the U.S. District Court for the Southern District of Ohio. Complaint, RE1. After limited discovery and briefing, the district court granted judgment in favor of Petitioner on June 29, 2016. Pet. App. at 69a-70a. Respondents filed a notice of appeal the following day. Notice of Appeal, RE68. Because of the impending Presidential election, the Sixth Circuit ordered expedited briefing and argument. Order (Doc. 14), *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 6, 2016).

On September 23, 2016, the court of appeals reversed the district court's judgment, applying ordinary principles of statutory construction to conclude that the Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote."[4] Pet. App. at 24a.

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[4] After concluding that Ohio's Supplemental Process violated Section 8's prohibition on removing voters from the rolls by reason of a failure to vote, the Sixth Circuit did not analyze Respondents' alternative argument that, in light of evidence that it consistently resulted in the erroneous removal of many eligible voters, the Supplemental Process also violates Section 8 because it does not constitute a "reasonable effort" to remove voters who have become ineligible by reason of a change in residence. *See* Pet. App. at 23a-24a.

The Sixth Circuit began with the text of Section 8 of the NVRA. It observed that under subsection (a), "each State shall . . . provide that the name of a registrant *may not* be removed from the official list of eligible voters *except*" under certain circumstances. *Id.* at 11a (quoting 52 U.S.C. § 20507(a)(3)). It noted that this provision was followed by "additional constraints on states' discretion," including the prohibition on removing voters based on their failure to vote. Pet. App. at 11a-12a. And it concluded that Ohio's Supplemental Process violated that mandate because it used a person's failure to vote as the trigger for a process that would result in removal if the voter took no further action. The court acknowledged the later enactment of HAVA – and the narrow exception for when failure to vote may be used in the confirmation process – but it also recognized HAVA's admonishment that it not "be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* at 12a (quoting 52 U.S.C. § 21145(a)).

The Sixth Circuit then applied several settled canons of statutory construction to reject Petitioner's argument that he could use the failure to vote under the Supplemental Process to trigger removing someone from the rolls. First, examining the NVRA's text, the court applied the canon of statutory construction requiring courts to "proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." Pet. App. at 21a (quoting *Sebelius v. Cloer*,

133 S. Ct. 1886, 1893 (2013)). The court observed that "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. at 21a (citation omitted). It then reasoned that "the Supplemental Process' trigger provision explicitly uses a person's failure to engage in any 'voter activity' – which includes voting – for two years as the 'trigger' for sending a confirmation notice." *Id.* Thus, "[u]nder the ordinary meaning of 'result' the Supplemental Process would violate the prohibition clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.*

Second, the court rejected Petitioner's contention that the NVRA's Failure-to-Vote Clause was "given a more narrow interpretation by . . . HAVA," which provides that "no registrant may be removed *solely* by reason of a failure to vote." Pet. App. at 21a-22a (quoting 52 U.S.C. § 21083(a)(4)(A)). The Sixth Circuit reasoned that the term "solely" did not preclude a finding that Ohio's Supplemental Process violated the NVRA because "operation of the Supplemental Process' trigger is ultimately based 'solely' on a person's failure to vote." Pet. App. at 22a. Applying the rule against surplusage, the court rejected Petitioner's argument that HAVA's use of the term "solely" showed that the NVRA was intended simply to prohibit states from removing voters for failing to vote without following the NVRA's Address-Confirmation Procedure. Observing that the NVRA, under Section 8(d), *always* requires a state to use the Address-Confirmation Procedure when removing voters, the court held that Petitioner's reading of

"solely" left no room for the Failure-to-Vote Clause to have any effect. If HAVA's restriction on removing voters "solely" for failure to vote meant only that a state had to follow the confirmation procedures of Section 8(d), the Failure-to-Vote Clause would be reduced to mere surplusage: Any program that complied with Section 8(d) would be permissible under the Failure-to-Vote Clause and thus, the Failure-to-Vote Clause would be unnecessary. *Id.* at 17a-18a. And the court appropriately declined "'to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *Id.* at 23a (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).[5]

Accordingly, the court of appeals reversed the district court's judgment and remanded for further proceedings with respect to a remedy for the state's NVRA violation.

On remand, the district court entered an interim injunction, which applied only to the November 2016 election. Under that injunction, any provisional ballot cast by certain voters who were removed pursuant to the Supplemental Process would be counted. Specifically, the district court ruled that, for the November 2016 General Election: (1) any voter who had been purged under the Supplemental Process in 2011, 2013,

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[5] For substantially the same reasons, the Sixth Circuit rejected Petitioner's argument that HAVA's Except Clause provides affirmative authorization for Ohio's Supplemental Process – an argument Petitioner seems to abandon in this petition. *See* Pet. App. at 15a-18a.

or 2015 must be able to cast a provisional ballot in-person at their early voting location or on Election Day, and (2) that such provisional ballots would be counted so long as the voter continued to reside in the county where they were registered at the time that they were unlawfully removed from the registration rolls and the voter had otherwise remained continuously eligible since last voting. Pet. App. at 94a-100a. Petitioner subsequently stipulated to court orders requiring the Secretary of State to count ballots cast by two additional categories of voters affected by the Supplemental Process: (1) voters unable to vote in person due to illness or disability; and (2) uniformed and overseas voters.[6] As a result of these orders, at least 7,515 qualified Ohio voters who had been removed from the rolls pursuant to the Supplemental Process had their votes counted. Pet. at 14.

Proceedings are ongoing before the district court. Because the decision of the court of appeals addressed only the issue of liability and the interim relief ordered by the district court applied only to the November 2016 election,[7] the parties are engaged in additional discovery and proceedings concerning the appropriate permanent relief. Primarily, the parties dispute the number of eligible voters who have been affected by the

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[6] *See* Joint Motion for Further Relief, RE91; Order, RE92; Order, RE93.

[7] Petitioner later stipulated to extend the interim relief to a special recall election held in Cuyahoga County, Ohio on December 6, 2016, *see* Joint Motion for Further Relief, RE94, but no ongoing preliminary injunction is in place pending final resolution of the litigation.

Supplemental Process, and accordingly what form the permanent relief should take. The district court's interim order covers only those who cast a provisional ballot in the November 2016 General Election, and does not include those who chose not to vote in that election but might wish to vote in the future, nor does it include certain other categories of voters affected by the Supplemental Process, such as vote-by-mail voters, who may have attempted to vote in November but been unable to. Motions and briefing at the remedial phase of this case are set to conclude in the district court on July 25, 2017.

REASONS WHY THE PETITION SHOULD BE DENIED

This Court should deny Petitioner's request for a writ of certiorari for four reasons. *First*, the Sixth Circuit is the only appellate court that has addressed this issue, so there is no circuit conflict requiring this Court's resolution. *Second*, Petitioner has failed to establish that the Sixth Circuit's decision will have widespread impact, as the vast majority of the states that Petitioner contends are affected have list-maintenance procedures that are readily distinguishable from Ohio's Supplemental Process. *Third*, the Sixth Circuit's decision was correct and comports with the decisions of this Court. It applied settled canons of statutory interpretation to a federal statute that was duly enacted pursuant to Congress's constitutional authority over the states' voter-registration procedures for federal

elections. *Finally*, the decision below presents a poor vehicle for review given its interlocutory posture.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

Petitioner does not – and cannot – contend that there is any split of authority among the courts of appeals on the question presented. No other court of appeals has even addressed the question of the scope and meaning of the NVRA's prohibition on removing voters from the rolls based on their failure to vote. The absence of a circuit split counsels strongly against this Court's review. *See* Sup. Ct. Rule 10(a); *see also Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for . . . certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given . . . to secure uniformity of decision between those courts in the nine circuits.").

II. PETITIONER HAS FAILED TO DEMONSTRATE THAT THE SIXTH CIRCUIT'S DECISION WILL HAVE WIDESPREAD IMPACT.

The Sixth Circuit's decision was exceedingly narrow. It held simply that the NVRA prohibits the Ohio

Secretary of State from relying solely on a voter's failure to vote to initiate a process for removing the voter from the rolls. Petitioner references "many States" that he contends have practices similar to Ohio's Supplemental Process. Pet. at 17-19. The vast majority of states across the nation, however, including almost all of the states cited by Petitioner, have established roll-maintenance practices that, unlike Ohio's Supplemental Process, use independent and reliable information that an individual has changed address – not a mere failure to vote – to initiate the Address-Confirmation Procedure set forth in Section 8 of the NVRA to ensure that the voter has moved. Moreover, nothing in the Sixth Circuit's decision prevents states from using the many available tools for maintaining their voter rolls that do not improperly rely on failure to vote.

A. The Majority of States Petitioner Cites Do Not Have Processes Comparable to Ohio's for Removing Voters from the Rolls.

In five of the states Petitioner cites – Alaska, Florida, Rhode Island, South Dakota, Missouri, and Kansas – the NVRA's Address-Confirmation Procedure is not triggered by a mere failure to vote as it is under Ohio's Supplemental Process. Rather, in these states, the process for removing a voter based on change of address is initiated after election-related mail to the

voter is returned as undeliverable.[8] Pet. at 18 (citing ALASKA STAT. § 15.07.130(a)-(b); FLA. STAT. § 98.065(2)(c); R.I. GEN. LAWS § 17-9.1-27(b); S.D. CODIFIED LAWS § 12-4-19; MO. STAT. §§ 115.181(2), 115.193; KAN. STAT. § 25-2354(a)). In some cases, the removal process may be started by the return of election-related mail that is sent to all registered voters in a jurisdiction. *E.g.*, FLA. STAT. § 98.065(2)(b). In others, the removal process is triggered when a postcard sent to voters who had not voted in one or more elections is returned as undeliverable. *E.g.*, *id.* § 98.065(2)(c); ALASKA STAT. § 15.07.130(a)-(b); *cf.* KAN. STAT. § 25-2354(a) (permitting mass or targeted mailings). But even in those states, a mere failure to respond to that postcard would not result in the voter's removal; the postcard has to be undeliverable to the voter as addressed. In either case, therefore, only if the mailing is returned as undeliverable – providing evidence that the voter has changed residence *independent of the failure to vote* – do these states begin the removal process by sending a notice to that voter, and, if the notice is not returned, removing the voter from the rolls if the voter does not vote in the next two federal election cycles. None of these states would be required to amend

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[8] Montana, too, uses returned mail as a trigger for the Address-Confirmation Procedure. MONT. CODE § 13-2-220. In Montana, however, the Change-of-Address-Confirmation Procedure may also be triggered when a voter does not respond to an initial confirmation mailing. This circumstance may raise issues similar to those present here, but the necessity of two confirmation mailings – as well as the fact that in Montana, voters can register on Election Day if they have been improperly purged – distinguishes the state's procedures from Ohio's. *See id.* §§ 13-2-220, 13-2-304.

its procedures based on the Sixth Circuit's decision below, which invalidated Ohio's Supplemental Process because it used failure to vote, and not independent evidence of a change of address, as the sole trigger for the Address-Confirmation Procedure.[9]

Petitioner also points to North Carolina, Nevada, Arkansas, Kentucky, Louisiana, Texas, Mississippi, and South Carolina, asserting that, like Ohio, these states delegate to their chief election officials the authority to determine what roll-maintenance practices to deploy to identify voters who may have moved. Pet. at 18-19. But Petitioner offers no record evidence that *any* of these states' chief election officials have followed the example of the Ohio Secretary of State by promulgating a removal procedure triggered by nothing more

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[9] Indeed, three of the states Petitioner identifies, Alaska, South Dakota, and California, did formerly have list-maintenance practices similar to Ohio's, but abandoned that practice in response to enforcement actions brought by the U.S. Department of Justice. *See* Letter dated Feb. 11, 1997, from Isabelle Katz Pinzler to Mark Barnett, Ex. 2 to Brief of the United States Department of Justice as *Amicus Curiae* ("DOJ Amicus Brief"), Doc. 29, *A. Philip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. 2016), at 82-83; Letter dated Feb. 11, 1997, from Isabelle Katz Pinzler to Bruce M. Botelho, Ex. 3 to DOJ Amicus Brief, at 85-86; S.D. CODIFIED LAWS § 12-4-19 (describing a process that relies on returned mail, not failure to vote, to trigger the Address-Confirmation Procedure); ALASKA STAT. § 15.07.130(a)-(b) (same); Joint Stipulation to Substitute Language, Ex. 1 to DOJ Amicus Brief, at 78 (stipulating to order requiring state to use undeliverable mail to trigger removal process rather than failure to vote); CAL. ELEC. CODE § 2224(a) (authorizing a residency confirmation postcard to be sent to nonvoters, but stating that non-voting shall not be used to trigger the removal process).

than a failure to vote. Rather, Petitioner relies on rank speculation that some of these states "may have previously relied on nonvoting to send notices" or "could do so in the future." *Id.*[10]

Likewise, Petitioner's citation to Illinois, Hawaii, and Iowa is misguided. Illinois and Hawaii maintain pre-NVRA statutes on their books that require the removal of infrequent voters with minimal or no notice, but Petitioner offers no evidence that either state is actually enforcing these provisions. *See* HAW. REV. STAT. § 11-17; 10 ILL. COMP. STAT. 5/4-17, 5/5-24, 5/6-58; ILL. ADMIN. CODE § 216.50(b).[11] Iowa permits officials to

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[10] Grasping for support, Petitioner points to a 2009 press release from the South Carolina Election Commission and a Frequently Asked Questions page on the Nevada Secretary of State's website. Both documents self-evidently contradict Petitioner's claims. First, although it suggests that the State may once have conducted a confirmation process and removed voters based on a failure to vote, the South Carolina press release states that, unlike voters purged under Ohio's Supplemental Process, in South Carolina "[e]ven after being removed [for failing to vote], voters who are still eligible will be permitted to vote." Pet. at 19 (citing S.C. State Elections Comm'n, "SEC Sends Notice to Inactive Voters" (May 6, 2009), https://www.scvotes.org/node/181). Likewise, the relevant Nevada FAQ simply states that a voter who fails to respond to a confirmation notice and fails to vote may be purged, and goes on to state that a voter may receive such a notice if election mail is undeliverable or the voter has a change of address on file with the Postal Service, both valid under the NVRA. It does not say that a voter will be targeted for removal based on a failure to vote. *Id.* (Nev. Sec'y of State, Election Frequently Asked Questions, http://nvsos.gov/sos/elections/election-resources/faqs#453).

[11] Indeed, even under Petitioner's interpretation of the Failure-to-Vote Clause, the NVRA prohibits the procedures laid out in Illinois's and Hawaii's statutes. *See* Pet. at 31 (arguing that purging non-voters without notice or a two-election-cycle waiting period is

send notices to voters who have not voted over a certain time, IOWA CODE § 48A.28(2)(b), but Petitioner offers no evidence that Iowa's election officials have actually exercised that authority and removed voters on this basis.

B. More Development of the Law Is Needed in States that May Have Procedures Similar to Ohio's.

Respondents are aware of only five states that currently employ procedures that might be implicated by the Sixth Circuit's decision: Tennessee, Georgia, West Virginia, Oklahoma, and Pennsylvania. Of these states, only Georgia's statute has been challenged in a case currently pending before the Eleventh Circuit. As to the others, the record is silent as to how they implement their procedures, and whether they take additional steps to ensure that eligible individuals are not erroneously removed from the rolls "by reason of" their failure to vote. The absence of such evidence only underscores the value of allowing the issue to percolate in the lower courts.[12] And even if these states' list-maintenance practices are similar to Ohio's, that is all

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unlawful under the NVRA). Thus, even if the Sixth Circuit's decision were reversed, these statutes would still be preempted by the NVRA.

[12] Even among these states, Ohio's Supplemental Process is the most aggressive. Ohio has the *shortest* failure-to-vote trigger – a period of only two years – and, as a result, will presumably have a higher percentage of eligible voters erroneously subjected to the removal procedure.

the more reason for this Court to allow other circuits to weigh in on the matter before reviewing the question presented here.

The decision below, therefore, will not have the widespread impact that Petitioner claims, as the vast majority of states Petitioner cites will not be affected at all, and Petitioner's concern that an unspecified number of states will now face lawsuits over this narrow issue, *see* Pet. at 19-21, is unfounded. Without further percolation in any of these other states, or in any other court of appeals, there is no basis for this Court's intervention.

C. Ohio Has Ample Means to Maintain Accurate and Up-To-Date Voter Registration Rolls.

Petitioner also asserts that the question presented implicates important questions concerning election integrity because it "eliminat[es] *one* method" for removing voters from the voter rolls. *Id.* at 14 (emphasis added). Many other methods for voter-list maintenance remain at Petitioner's disposal, however, such as the methods used by at least 38 other states around the country whose practices in no way resemble Ohio's. Indeed, Petitioner himself is *already* using other list-maintenance procedures not impacted by the Sixth Circuit's ruling, including the NVRA safe harbor, statewide mailings to all registered voters, and membership in the Electronic Registration Information Center ("ERIC"), an interstate data-sharing system

that aggregates data from voter-registration lists, motor-vehicle departments, and other sources to identify individuals who have likely died or moved outside their jurisdiction of registration. *Id.* at 34.

While Petitioner has shown no actual impact on election integrity arising from the inability to purge infrequent voters, the harm avoided by the interim injunction was substantial. Petitioner readily acknowledges that the Supplemental Process removed at least 7,515 registered and eligible Ohio voters who would have been denied their right to vote this past November absent the decision of the court of appeals. Depriving qualified voters who have properly registered of their right to vote simply because they have not voted in recent elections poses a far greater threat to confidence in the democratic process. Petitioner's one-sided concerns about election integrity are hardly a basis for granting certiorari.

III. THE DECISION BELOW WAS CORRECT AND RAISES NO ISSUES WORTHY OF THIS COURT'S REVIEW.

Without other basis for certiorari review, Petitioner is left to argue that the Sixth Circuit erred in its interpretation of the statute. But mere error correction does not create a "compelling reason[]" for granting certiorari. Sup. Ct. Rule 10. In any event, the Sixth Circuit's interpretation of Section 8 of the NVRA is a straightforward – and correct – application of the

settled canons of statutory construction established by this Court.

The Sixth Circuit applied "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, LLC v. Varsity Brands, Inc.*, ___ S. Ct. ___, 2017 WL 1066261, at *7 (Mar. 22, 2017) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)). Giving the terms "results in" and "by reason of" their ordinary dictionary meaning, the court held that the Supplemental Process constitutes an unlawful list-maintenance program because it "results in" removal of voters from the voter rolls "by reason of" their failure to vote. Pet. App. at 21a; *see also Sebelius*, 133 S. Ct. at 1893 ("unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning"). The court also correctly held that Ohio's Supplemental Process violates HAVA, which reaffirms that the NVRA's removal process cannot be triggered "solely" by a failure to vote. Pet. App. at 21a-23a.

Petitioner advances three arguments in an attempt to manufacture errors creating an issue worthy of certiorari: (a) that the decision below raises constitutional issues that were better avoided; (b) that HAVA changed the NVRA's requirements; and (c) that failure to vote under Ohio's Supplemental Process is too attenuated from the act of removal to be considered a proximate cause of the removal. None has merit.

A. The Sixth Circuit's Decision Does Not Raise Constitutional Questions Because the NVRA Is Valid under the Elections Clause.

Petitioner argues that the court of appeals should have adopted an interpretation of the NVRA that permits the Supplemental Process in order to avoid raising any constitutional questions concerning the scope of congressional authority under the Elections Clause. U.S. CONST. art. I, § 4, cl. 1. But this case raises no such concerns. As this Court clearly reaffirmed in *ITCA*, registration procedures squarely fall under the umbrella of "Times, Places, and Manner" procedures that Congress is permitted to regulate for federal elections. *See* 133 S. Ct. at 2253 ("'Times, Places, and Manner' . . . are comprehensive words, which embrace authority to provide a complete code for congressional elections, *including . . . [the] regulations relating to registration*" found in the NVRA.) (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (emphasis added and internal quotation marks omitted). Since the Elections Clause authorizes Congress to displace a state's registration procedures for federal elections, Petitioner's other arguments about "Elephants in Mouseholes," "Government Structure," and "Laboratories of Democracy" are irrelevant. Pet. at 30-34. Indeed, this Court has already recognized that "[w]hen Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the

States." *ITCA*, 133 S. Ct. at 2257. Petitioner thus cannot now raise federalism concerns regarding the fact that the NVRA displaces parts of a state's registration regime to argue that the NVRA is unconstitutional; the Court has already considered and dismissed those concerns in this context.

Petitioner protests that prohibiting states from employing the roll-maintenance mechanisms of their choice *might* interfere with their ability to establish voter *qualifications* under the Constitution's Qualifications Clause. Pet. at 30; *see also* U.S. CONST. art. I, § 2, cl. 1; *ITCA*, 133 S. Ct. at 2257-58 (discussing the same). But as noted above, *ITCA* expressly held that registration concerns the time, place, and manner of holding federal elections, not voter qualifications. Ignoring *ITCA*, Petitioner contends that under some unspecified states' laws, registration *might* be considered a voting qualification rather a regulation of the manner by which they conduct elections. But surely states cannot circumvent Congress's authority under the Elections Clause simply by unilaterally declaring any time, place, or manner issue to be a "qualification" issue for federal elections. *See ITCA*, 133 S. Ct. at 2253 (The Elections Clause is necessary because leaving the "exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." (quoting The Federalist No. 59 (A. Hamilton))).

In any event, Petitioner does not contend that registration is a voter qualification under *Ohio* law. *See*

Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.") (internal citations and quotation marks omitted).

Petitioner also fleetingly suggests that voting might *itself* be a voter qualification, Pet. at 30, rendering a failure to vote disqualifying. But that argument fails as a matter of state and federal law. Petitioner does not point to any provision of Ohio law suggesting that anyone who fails to vote thereby becomes ineligible to vote. Moreover, as the Senate noted in enacting the NVRA, in our system, citizens have the right to vote, and the right to choose not to vote – and should not be penalized for either choice. *See* S. REP. NO. 103-6, at *17. Petitioner's attempt to manufacture a constitutional issue that the Sixth Circuit should have avoided is squarely foreclosed by *ITCA*.

B. HAVA Did Not Change the NVRA's Requirements.

Petitioner next argues that a provision in the later-enacted HAVA supersedes or narrows the NVRA's prohibition on removing registrants for not voting. He argues that a provision of HAVA requiring application of the NVRA's roll-maintenance procedures and restrictions to the newly mandated statewide voter registration databases also effected an alteration in the meaning of the Failure-to-Vote

Clause. *See* Pet. at 25. According to Petitioner, by providing that "no registration may be removed solely by reason of a failure to vote," HAVA restricts the Failure-to-Vote Clause only to instances where the failure to vote alone – without the notice-and-waiting period required under the NVRA's Address-Confirmation Procedure – is used as the basis to remove a voter from the rolls. *Id.* But HAVA clearly states (in multiple places) that it should be construed as being "consistent with the" NVRA – not to supersede it. 52 U.S.C. § 21083(a)(4)(A). In 52 U.S.C. § 21145(a), Congress warns that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of" the NVRA. *Id.* § 21145(a). Thus, HAVA cannot be read to alter the NVRA's prohibition on list-maintenance procedures that "result in" the removal of a voter "by reason of failure to vote." *Id.* § 20507(b)(2).

This is especially the case where, as here, HAVA is wholly consistent with the NVRA's Failure-to-Vote Clause. *Id.* § 21083(a)(4)(A). Reading these statutes as a whole, HAVA's language is most naturally read as underscoring that failure to vote cannot be the reason for triggering removal; it can be considered *only* as part of the carefully articulated procedure used to confirm a *change of address for which the state has independent evidence. See Star Athletica*, 2017 WL 1066261, at *7 ("[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning. We thus look to the provisions of the whole

law to determine [a provision's] meaning." (citations and quotation marks omitted)). Had Congress intended to amend the NVRA's Failure-to-Vote Clause directly, it could easily have done so. But rather than eliminating or restricting the NVRA's prohibition on removing registrants for failure to vote, it added only a caveat for clarification of the NVRA's original language prohibiting list-maintenance procedures that "result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Specifically, HAVA simply clarified that the use of failure to vote as a component of the Address-Confirmation Procedure – and *only* in that limited context – is not prohibited by the much broader Failure-to-Vote Clause. Petitioner attempts to turn this helpful clarification into a sweeping change that undoes a key provision of NVRA. But "[t]he fact that [Congress] did not adopt" a "readily available" amendment "strongly supports" the conclusion that the NVRA's meaning did not change with the passage of HAVA. *NLRB v. SW General, Inc.*, ___ S. Ct. ___, 2017 WL 1050977, at *9 (Mar. 21, 2017) (quotation marks and citation omitted).

C. The Sixth Circuit Correctly Applied Settled Canons of Statutory Construction.

1. Ohio's Supplemental Process violates the plain terms of the Failure-to-Vote Clause.

Petitioner also errs in arguing that the Sixth Circuit failed to adhere to ordinary canons of statutory

construction; principally, that the court misconstrued the Failure-to-Vote Clause's "results in" language as a boundless prohibition on any removal where failure to vote is a "but-for" cause rather than requiring that it be a "proximate cause" for removal. Petitioner then argues that under Ohio's Supplemental Process, failure to vote is merely the attenuated, "but-for" cause, not the "proximate cause," for the voter's removal. Pet. at 22-24.

Nowhere, however, does the Sixth Circuit say or imply that the Failure-to-Vote Clause prohibits any removal where failure to vote was a "but-for" cause. Its interpretation of the statute is fully consistent with the notion of proximate causation. The court found that Ohio's Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Pet. App. at 24a. That is because Ohio's Supplemental Process *expressly* relies on failure to vote – and failure to vote alone – to subject the voter to the Address-Confirmation Procedure, where there is no independent evidence of a change of address. As this Court has explained, the concept of proximate cause precludes liability only "where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). Under Ohio's Supplemental Process, the initial two-year period of voter inactivity is the key event that triggers a voter's removal from the rolls. It cannot be said that when a voter is removed

pursuant to the Supplemental Process, failure to vote played only a "fortuitous" role in the voter's removal because it was followed by the Address-Confirmation Procedure.

Petitioner argues that under Ohio's Supplemental Process, the initial failure to vote for two years does not "cause" the voter's removal: According to the Petitioner, the true cause of removal is the voter's subsequent "failure to respond to a notice" sent as a result of that two-year period of inactivity. Pet. at 24. The NVRA cannot plausibly be read that way. Under the NVRA's "safe harbor," the voter's change of address, as reflected in the U.S. Postal Service's NCOA system, is quite plainly the cause of the voter's removal; the Address-Confirmation Procedure is used to confirm that change of address but it does not interrupt the causal link between the change-of-address information that triggered the removal process and the removal itself. But Petitioner argues that the analogous triggering information under the Supplemental Process – a citizen's failure to vote – is *not* the proximate cause of removal, even when it results in removal without any further affirmative act by the individual: If the voter continues not to vote and fails to take action in response to a notice, that voter is removed. As the Sixth Circuit explained, that is the plainest violation of the prohibition on removing voters from the voter rolls "by reason of" their failure to vote. In other words, under the Supplemental Process, failure to vote has a sufficiently close nexus to removal to constitute its proximate cause and therefore to run afoul of the Failure-to-Vote Clause.

Petitioner also invites this Court to reexamine the rule requiring narrow construction of exceptions to general statutory schemes. *Id.* at 26-28. Regardless of whether the Except Clause is construed narrowly or broadly or is understood as an exception or an "explanation," however, it cannot be interpreted to permit Ohio's Supplemental Process. HAVA's Except Clause simply serves to clarify that failure to vote *can* play a narrow role in a voter's removal, but only as part of the process for confirming independent evidence that a voter has moved. *See* Pub. L. No. 107-252, § 903 (2002) (headnote describing the amendment as a "[c]*larification* of [the] ability of election officials to remove registrants from [the] official list of voters on grounds of [a] change of residence"). If it were read to allow failure to vote to play a role in the removal of a voter from the rolls apart from the Address-Confirmation Procedure, then the exception would swallow the rule, rendering superfluous the NVRA's prohibition on penalizing voters for abstaining from voting. In other words, reading the NVRA's Failure-to-Vote Clause and HAVA's Except Clause together, failure to vote cannot serve both as the initial evidence of a change of address on the front-end and as confirmation of that change of address on the back-end, because that would lead, as it does under Ohio's Supplemental Process, to removal "by reason of" a failure to vote rather than by reason of a change of address.

2. Error correction is not a valid basis for granting certiorari.

At bottom, Petitioner's argument amounts to nothing more than a bare disagreement with the way in which the Sixth Circuit applied settled canons of statutory interpretation to conclude that Ohio's Supplemental Process violates the NVRA. The Sixth Circuit did not err. But even if it had, "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (quoting S. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013)); *see also Magnum Imp. Co.*, 262 U.S. at 163 (holding that certiorari is not appropriate "merely to give the defeated party in the Circuit Court of Appeals another hearing"). Thus, even if the Sixth Circuit's decision were incorrect (and it is not), certiorari would not be warranted here.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR THE QUESTION PRESENTED.

Finally, this case presents a poor vehicle for review because it arises in an interlocutory posture. With Petitioner's consent, this case was remanded to the district court for further proceedings prior to the petition being filed, and discovery and remedial proceedings are now ongoing in the district court. The interlocutory posture of this case "alone furnishe[s] sufficient ground for . . . denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251,

258 (1916). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Id.*; *see also Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 282 (9th ed. 2007) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari."). Motions and briefing at the remedial phase of this case are set to conclude in the district court on July 25, 2017. As Petitioner notes, there is no pending election in Ohio. Pet. at 21. The next federal election will not take place until the May 8, 2018 primary, which is more than a year away. *See, e.g.*, OHIO REV. CODE § 3501.01(E)(1). Petitioner will suffer no prejudice from litigating this case to a final judgment, and seeking certiorari on a complete record, as is the normal course for this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS.

No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Ohio Secretaries of State from both political parties have long used a "Supplemental Process" to fulfill Ohio's list-maintenance duties under the National Voter Registration Act (NVRA), 52 U.S.C. § 20507(a)(4). This process sends confirmation notices to voters who lack voter activity over two years, and removes individuals from the rolls if they *both* fail to respond to the notice *and* fail to engage in voter activity for four more years. While the NVRA's "Confirmation Procedure" permits this process, *id.* § 20507(d), the Sixth Circuit held that using inactivity as a "trigger" for sending notices violates the NVRA's "Failure-To-Vote Clause," *id.* § 20507(b)(2).

Secretary of State Jon Husted's petition explained why the Court should grant review. *First*, the decision below resolved an important issue that requires immediate attention. States still struggle with their critical list-maintenance duties, and the Sixth Circuit's logic could have far-reaching effects. Review is appropriate now, moreover, because States must defend suits from both sides on this issue, and the Court can resolve the petition outside the context of an election. *Second*, the decision below conflicts with this Court's interpretive principles. The Sixth Circuit disregarded proximate causation; interpreted amendments in the Help America Vote Act (HAVA) to serve no purpose; relied on a rarely invoked canon at the expense of a ubiquitous one; and ignored the backdrop against which Congress passed the NVRA.

In response, Respondents overlook the reasons for immediate review while overstating the benefits of delay. Further, they must add words to the NVRA and remove words from HAVA to defend the Sixth Circuit's decision.

I. RESPONDENTS FAIL TO MINIMIZE THE NEED FOR IMMEDIATE REVIEW

The Secretary explained that the Court should grant review because the petition raises an important issue and provides an ideal vehicle for resolving it outside the context of an election. Pet. 14-22. Respondents' contrary arguments lack merit.

A. Respondents' Request For Further Percolation Ignores The Need For An Answer

Respondents ask the Court to wait for a circuit conflict. Opp. 17, 22-23. They overstate the upsides and ignore the downsides of more percolation.

Beginning with the purported *upsides*, this case is not one that should require a conflict. When a case affects the States or their elections, the Court regularly grants certiorari because of "the importance" of the issue. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (Stevens, J., op.). The Court granted review in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), for example, even though no other circuit had then addressed whether States could adopt "evidence-of-citizenship" registration requirements under the NVRA. *See, e.g.*, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cook v. Gralike*, 531 U.S. 510, 518 (2001).

Nor would delay serve a useful purpose. The petition presents a discrete statutory-interpretation question that does not turn on evidentiary issues best fleshed out over a range of cases. And several reasoned opinions have aired the competing viewpoints, so the main benefit of further percolation has been achieved. The panel decision was divided.

Compare Pet. App. 10a-24a, *with* Pet. App. 32a-35a (Siler, J., dissenting). And the majority overturned a thorough district-court opinion. Pet. App. 50a-62a. Since the Secretary filed this petition, moreover, another court has ruled for Georgia on this question. *Common Cause v. Kemp*, No. 1:16-cv-452, Doc.34, at 7-16 (N.D. Ga. Mar. 17, 2017), *on appeal*, No. 17-11315 (11th Cir.). Thus, a split of consequence has already developed; in fact, more judges now agree with the Secretary than with Respondents.

Respondents also ignore the *downsides* from delay. Most importantly, review now would avoid having to confront this question in an election-eve filing. Those filings are common. *E.g.*, *Ohio Democratic Party v. Husted*, 137 S. Ct. 28 (2016); *Husted v. Ohio State Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014); *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Yet the Court, the litigants, and the States would benefit if the Court could resolve this question on the usual timetable, rather than on the brief-a-day timetable that often accompanies emergency applications.

In addition, further percolation would extend the Catch-22 in which States find themselves. On one hand, lawsuits challenging a State's list-maintenance efforts as inadequate have led to settlements that *required* the process that the Sixth Circuit said was *barred*. Pet. 19-20. Indeed, former Justice Department lawyers say the Department "negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here." Br. of *Amici* Former Dep't of Justice Attorneys, at 4; *cf.* Br. of *Amicus* Judicial Watch, at 15-16. On the other, Respondents' counsel has already sent a letter to another State arguing that its similar process vio-

lates the NVRA. Pet. 21. Thus, concerns with continued litigation are not "unfounded," Opp. 23, and further percolation ignores this predicament.

B. As The Multistate *Amicus* Brief Shows, This Question Could Affect Many States

The Secretary identified many States that require or permit the use of nonvoting in their maintenance programs. Pet. 17-19. Respondents counter that "only five states" "might be implicated" by the decision below. Opp. 22. Yet the decision's potentially broad effects are illustrated by the *amicus* brief filed by *fifteen* States. Br. of *Amici* Georgia and 14 Other States, at 1 ("Multistate *Amicus* Br.").

To begin with, some eight States have laws that *expressly* permit or require officials to send notices based on nonvoting. Pet. 17-18. Respondents concede that five (Tennessee, Georgia, West Virginia, Oklahoma, and Pennsylvania) permit practices like the Supplemental Process. Opp. 22. They distinguish Montana as using returned mail to trigger a notice, Opp. 19 n.8, but its law grants its Secretary discretion to choose from four options, including "sending forwardable confirmation notices" to those "who failed to vote in the preceding federal general election." Mont. Code Ann. § 13-2-220(1)(c)(iii). And while agreeing that Iowa permits notices to be sent to nonvoters, Respondents claim that officials may not have "exercised that authority." Opp. 21-22. Since Iowa law permits the practice, however, the decision below could affect it.

In addition, other States target *nonvoters* with *nonforwardable* mailings, and send confirmation notices to individuals whose nonforwardable mailings

are returned as undeliverable. Pet. 18. Respondents say that the decision below will not affect these States because the returned mail provides "evidence that the voter has changed residence *independent of the failure to vote*." Opp. 19. Respondents fail to explain why this distinction matters under *either* the decision below *or* the NVRA. The decision below could hold that the Failure-To-Vote Clause barred the Supplemental Process only by reading the phrase "result in" as adopting a limitless causation test. Pet. App. 21a. Because statutes are not chameleons, *Clark v. Martinez*, 543 U.S. 371, 382 (2005), that test affects any State using nonvoting as a cause to start maintenance efforts (as these States do by targeting *nonvoters* with nonforwardable mailings). In fact, Respondents later suggest that the Failure-To-Vote Clause does not "allow failure to vote to *play a role* in the removal of a voter from the rolls apart from the" Confirmation Procedure. Opp. 33 (emphasis added). Furthermore, Respondents do not explain where the NVRA's text compels States to send notices based on (what Respondents believe to be) alleged "independent and reliable information." Opp. 18. Other than its Safe-Harbor Provision for Postal Service data, the statute is *silent* about what should trigger a notice. The NVRA leaves that decision to each State.

Respondents also note that Alaska, South Dakota, and California "abandoned" a practice like Ohio's in the face of federal actions in the 1990s. Opp. 20 n.9; *see also Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1224 (N.D. Ill. 1995). That some States have *already* been forced to change course because of an incorrect reading of the NVRA confirms the need for prompt review. Indeed, Congress through HAVA has since clarified the NVRA in

a way that sided with these States. Pet. 24-25. The Court should grant review before more States are compelled to change their practices as a result of a misreading of the NVRA (and now HAVA).

Finally, Respondents call it "rank speculation" for the Secretary to note that some States grant their officials discretion to determine who should receive notices, and so authorize practices like the Supplemental Process. Opp. 20-21; *see* Pet. 18-19. Yet several of these States—Louisiana, Nevada, South Carolina, and Texas—joined the multistate *amicus* brief that made the same point. Whether or not a particular State uses a procedure like the Supplemental Process today, States have an interest in this Court clarifying this issue sooner rather than later.

II. Respondents Do Not Reconcile The Conflict Between The Decision Below And This Court's Cases

The Secretary explained (at 22-34) that the decision below conflicted with this Court's cases. Respondents' arguments confirm the conflict.

A. Respondents Disavow The Sixth Circuit's Use Of A Criticized Canon, And Misapply The Applicable Canons

The Sixth Circuit enlarged a rare canon (that exceptions be read narrowly) at the expense of common canons (the avoidance canon and the rule that Congress does not hide elephants in mouseholes). Pet. 26-34. Respondents do not justify these errors.

Exceptions Canon. The Secretary showed that the Sixth Circuit wrongly invoked the canon that statutory exceptions be narrowly construed. Pet. 26-28. Respondents all but concede this error. They

now claim that this canon does not matter because, setting it aside, the Supplemental Process violates the Failure-To-Vote Clause. Opp. 33. Yet they *themselves* invoked this canon in the Sixth Circuit. Appellants' Br., 6th Cir. R.24, at 30. And the canon formed a key part of the Sixth Circuit's holding, which "err[ed] on the side of giving maximum effect" to the Failure-To-Vote Clause. Pet. App. 17a. Despite Respondents' current disavowal of the canon, this case presents a good vehicle for reassessing it.

Avoidance Canon. The Secretary noted that the canon of constitutional avoidance applies because the Sixth Circuit's reading raised a serious constitutional question: Do registration and failure-to-vote laws qualify as *manner* regulations subject to federal control or *qualification* regulations subject to state control? Pet. 28-30. In response, Respondents argue that the Failure-To-Vote Clause is "clearly" a constitutional manner regulation after *Inter Tribal*. Opp. 26-28. This argument misunderstands both *Inter Tribal* and the avoidance canon.

Respondents say that *Inter Tribal* "dismissed" constitutional concerns. Opp. 27. But the Court emphasized that the NVRA would raise "serious constitutional doubts" if it blocked a State from enforcing its qualifications. 133 S. Ct. at 2258. It also *reserved* the question whether registration laws qualify as "manner" or "qualification" regulations (and said nothing about failure-to-vote laws). *Id.* at 2259 n.9. Nor does it matter, as Respondents claim, whether Ohio treats these registration and failure-to-vote laws as qualifications under *state law*. Opp. 27-28; *cf.* Ohio Const. art. V, § 1. The Elections Clause means the same thing for all 50 States. That some

States historically treated registration and failure-to-vote laws as qualifications is good evidence that they could be treated in that way under the Elections Clause. Pet. 2-4; *District of Columbia v. Heller*, 554 U.S. 570, 584-85 (2008) (relying on state laws to interpret Second Amendment).

Regardless, Respondents misunderstand the avoidance canon by suggesting that the Secretary challenges the NVRA *in this case*. Opp. 27. The canon exists "to *avoid* the decision of constitutional questions." *Clark*, 543 U.S. at 381. The Court need not resolve any of these complex constitutional issues here. But the questions are sufficiently serious to trigger the canon, which conflicts with the Sixth Circuit's broad reading of the Failure-To-Vote Clause.

Elephants-In-Mouseholes Presumption. The Secretary noted that, when Congress passed the NVRA, most States used nonvoting *in some manner* to maintain the rolls. Thus, the rule that Congress does not "hide elephants in mouseholes" and the federalism "clear-statement rule" direct courts to interpret the Failure-To-Vote Clause as enacting modest, not radical, reform. Pet. 30-34. In response, Respondents do not dispute the backdrop against which Congress passed the NVRA; instead, they read *Inter Tribal* as eliminating these rules for laws passed under the Elections Clause. Opp. 26. Respondents are wrong.

Inter Tribal held only that no presumption against preemption applies for federal laws passed under the Elections Clause. 133 S. Ct. at 2256-57. The rule that Congress does not "hide elephants in mouseholes" is a different presumption that applies in many diverse areas, including those that do not implicate federalism. *E.g.*, *Czyzewski v. Jevic Hold-*

ing Corp., 137 S. Ct. 973, 984 (2017). *Inter Tribal* provides no basis for discarding this commonsense interpretive rule here.

In addition, Respondents read *Inter Tribal*'s discussion of the presumption against preemption expansively to leave no room for federalism concerns whatsoever. Opp. 26-27. That reading is in tension with *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which interpreted the Elections Clause to protect federalism. *Id.* at 2673-74. Regardless, this question is important: The Court should take this case to decide whether Respondents correctly extend *Inter Tribal*'s discussion of the presumption again preemption to this different context.

B. Respondents Interpret HAVA's Amendments To Serve No Purpose

The Secretary explained that the Sixth Circuit wrongly interpreted HAVA's clarifying amendments to serve no purpose. Pet. 24-26. A comparison of the Secretary's explanation for these clarifications with Respondents' explanation illustrates as much.

As the Secretary noted, a debate existed in the 1990s about whether the Failure-To-Vote Clause allowed States to use nonvoting as a reason for sending notices under the Confirmation Procedure. Pet. 8-9. HAVA's amendments—including the addition to the Failure-To-Vote Clause and the provision noting that voters could not be removed "solely" for nonvoting—clarified that the NVRA allowed States to do so. After HAVA, then, Justice Department lawyers "*required* states to adopt procedures that are indistin-

guishable from Ohio's Supplemental Process." Br. of *Amici* Former Dep't of Justice Attorneys, at 13.

Respondents, by comparison, uncover a different explanation for HAVA's clarifications: Congress passed them allegedly to clarify that the NVRA's Failure-To-Vote Clause did not *outlaw* the NVRA's Confirmation Procedure. Opp. 29-30. That makes little sense. Respondents identify no pre-HAVA authority—DOJ guidance, precedent, or the like—that adopted this schizophrenic reading of the NVRA to *prohibit* what it *permitted*. Nor would such a reading comport with the principle to "'read statutes as a whole.'" *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). Respondents' explanation of HAVA's clarifications thus is no explanation at all.

C. Respondents Wrongly Claim That The Sixth Circuit Adopted A Proximate-Cause Test, And That They Can Satisfy The Test

The Secretary showed that the Failure-To-Vote Clause uses language ("by reason of") that requires a proximate-cause connection between nonvoting and removal, and that an individual's failure to respond to a notice breaks that causal connection. Pet. 22-24. Respondents retort that the Sixth Circuit *did* use a proximate-cause test, and that the test invalidates the Supplemental Process. Opp. 30-33. They are wrong on both counts.

To begin with, Respondents mistakenly suggest that the Sixth Circuit adopted proximate-causation principles. Opp. 31. The court reasoned that the word "'result'" in the Failure-To-Vote Clause means "'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (citation omitted). The court

chose the wrong definition of "result." Multistate *Amicus* Br., at 9-11. Regardless, the Sixth Circuit's definition addresses factual cause, not proximate cause. *E.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266-68 & n.10 (1992). And, in other contexts, the Court has repeatedly read a different phrase in the Failure-To-Vote Clause ("by reason of") to incorporate proximate cause as well. *Id.* at 268.

In addition, Respondents wrongly suggest that if the Sixth Circuit *had* applied a proximate-causation element, the court *would* have found that the Supplemental Process makes nonvoting a proximate cause of removal. Opp. 31-32. That is so, according to Respondents, because there is more than a "'fortuitous'" connection between nonvoting and removal. Opp. 32. Yet proximate cause is a broad "label" that incorporates many different concepts. *Holmes*, 503 U.S. at 268. And HAVA clarified the demanding type of proximate causation that the NVRA requires—nonvoting must be "'the *sole* proximate cause'" of removal. Multistate *Amicus* Br., at 13 (quoting *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011)). The Supplemental Process does not remove individuals *solely* for nonvoting, as they must *additionally* fail to respond to a notice.

To meet this sole-cause test, Respondents rewrite the statute. They say that this test is met because the "Supplemental Process *expressly* relies on failure to vote—and failure to vote alone—to subject the voter to the Address-Confirmation Procedure." Opp. 31. But the Failure-To-Vote Clause bars *removing* voters based on nonvoting; it says nothing about *starting the Confirmation Procedure* based on nonvoting.

* * *

All told, the decision below conflicts with many of this Court's interpretive principles, and Respondents have said nothing to reconcile these conflicts.

III. DESPITE RESPONDENTS' "INTERLOCUTORY" CONCERNS, THE COURT WILL NOT FIND A BETTER VEHICLE TO RESOLVE THIS QUESTION

Respondents lastly argue that this case's "interlocutory" nature makes it a bad vehicle. Opp. 34-35. Not so. This case is interlocutory in only a technical sense, one that provides no reason for delay. The district court "enter[ed] final judgment," Pet. App. 40a n.1, recognizing that this question involves a purely legal issue. And while the Sixth Circuit reversed, it too recognized that the question could be decided *now* by holding that the Supplemental Process violates the NVRA. Pet. App. 24a. The court remanded only for "remedial proceedings." Opp. 34. Now or later, the question will be the same. And a decision now comes with an important benefit: The Court can resolve the question outside the context of an election. In short, "the interlocutory status of the case [is] no impediment to certiorari [because] the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention [would] serve to hasten or finally resolve the litigation." Stephen Shapiro et al., *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF FORMER ATTORNEYS OF THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Antonin Scalia & Bryan A. Garner, *Reading Law* (2012).....12

Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005).....15, 16

Consent Decree and Order, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006).....14

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Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated Mar. 3, 2017).....18, 19

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IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are six former attorneys of the Civil Rights Division of the United States Department of Justice:

1. Colonel Karl S. "Butch" Bowers is the State Staff Judge Advocate for the Joint Force Headquarters, South Carolina Air National Guard, and a lawyer in private practice, focusing on governmental and legislative affairs, campaign finance and election law, and regulatory matters. In 2007-08, Col. Bowers was appointed by President George W. Bush as Special Counsel for Voting Matters at the U.S. Department of Justice. He also has served as the Staff Judge Advocate for the 169th Fighter Wing, as the Chairman of the South Carolina Election Commission, and as a JAG officer. Col. Bowers received a J.D. from Tulane Law School, an M.P.A. from the College of Charleston, and a B.A. from the University of South Carolina.

2. Christopher Coates is General Counsel for the American Civil Rights Union. He worked in the Voting Section of the Justice Department from 1996-2010. During ten of those years, he worked in a supervisory or management position, and during two of those years he was the Chief of the Voting Section. He earned the Walter W. Barnett Memorial Award in 2007, the Civil Rights Division's second highest award for excellence in advocacy. From 1985-96, Mr. Coates was an attorney with

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1. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief, and the parties have provided written consent to its filing. No counsel for any party authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Voting Rights Project of the American Civil Liberties Union. In 1991, he was awarded the Thurgood Marshall Decade Award by the Georgia NAACP for his work in voting rights and civil rights law. He is a graduate of the University of North Carolina at Chapel Hill and the University of North Carolina School of Law.

3. Christy McCormick has worked in voting and elections for over twenty-five years, starting out as an assistant voter registrar in Connecticut in 1988. She is currently a Commissioner on and former Chair of the U.S. Election Assistance Commission (EAC). Prior to the EAC, she was a Senior Trial Attorney in the Voting Section of the Department of Justice's Civil Rights Division for eight years. During 2009-10, she was detailed by the Deputy Attorney General to the U.S. Embassy in Baghdad to work on the Iraqi national elections and rule-of-law matters. Previously, she clerked for Justice Elizabeth A. McClanahan on the Court of Appeals of Virginia. She also served as an Assistant Solicitor and Assistant Attorney General in Virginia. Commissioner McCormick received a B.A. from the University of Buffalo and a J.D. with honors from the George Mason University (now Antonin Scalia) Law School. She also has attended the William & Mary School of Law.

4. Robert D. Popper has been practicing law for twenty-six years. He has special knowledge and expertise in the area of voting law. Along with Professor Daniel D. Polsby, he is the co-creator of the "Polsby-Popper" compactness standard, used to measure racial and partisan gerrymandering. In 1995, he represented plaintiffs in a successful constitutional challenge alleging racial segregation in the design of New York's 12th

Congressional District. In 2005, Mr. Popper joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, and in 2008, he was promoted to Deputy Chief. In 2013, he joined Judicial Watch as Director of the Election Integrity Project, in which capacity he litigates voting rights cases. Mr. Popper is a graduate of the University of Pennsylvania and Northwestern Law School.

5. Bradley J. Schlozman served as a Deputy Assistant Attorney General (and Acting Assistant Attorney General) of the Civil Rights Division from 2003-06, where his responsibilities included supervision of the Voting Section. He also later served as U.S. Attorney for the Western District of Missouri from 2006-07. Mr. Schlozman now practices law at the Hinkle Law Firm and frequently represents states and municipalities on a variety of voting rights matters.

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During their tenures, *amici* were charged with enforcing the nation's election laws, including the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). *Amici* have a continued interest in the proper interpretation and enforcement of these laws. The Sixth Circuit adopted an interpretation of the NVRA that contradicts how *amici* enforced that statute. In fact, during *amici*'s tenures, the Justice Department negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here. The Sixth Circuit's interpretation of the NVRA squarely contradicts this history of enforcement and threatens to undermine the core purposes of the NVRA—ensuring the accuracy of state voter rolls and protecting the integrity of federal elections.

SUMMARY OF ARGUMENT

Amici were once tasked with enforcing the NVRA, part of the "complex superstructure of federal regulation" that "Congress has erected ... atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). The NVRA requires the states to keep their voter rolls up to date. Each state must adopt a program that removes voters from the rolls when they move to a different jurisdiction. Although a voter cannot be removed solely because he failed to vote, a voter can be removed if the state sends him a notice and he neither

responds nor votes in two consecutive federal elections. There are no limits on when the states can send these notices or to whom they can send them; the NVRA says nothing about that.

Or at least that is how *amici* interpreted and enforced the NVRA when they served in the Civil Rights Division of the Justice Department. But the Sixth Circuit, in a 2-1 decision, rejected this settled interpretation. It struck down Ohio's Supplemental Process, which sends individuals an NVRA-compliant notice if they have not engaged in voter activity for two years. The Supplemental Process violates the NVRA, according to the Sixth Circuit, because the "trigger" for the notice is a person's failure to vote.

The Sixth Circuit erred, and its error warrants this Court's intervention. The text, structure, and history of the NVRA all point in the same direction: the NVRA requires the states to send notices before removing voters for changing residences. But it does not regulate the "triggers" for those notices. In fact, *amici* helped the Justice Department negotiate settlements with localities in Pennsylvania, Indiana, and Arkansas that required a notice procedure indistinguishable from Ohio's Supplemental Process. The decision below directly contradicts this history of federal enforcement. And it deprives the states of an important tool in combatting bloated voter rolls. "[A]ccurate and current voter registration lists," in turn, "are essential to the integrity of the election process and for the protection of the individual." H.R. Rep. No. 103-9, at 14 (1993); S. Rep. No. 103-6, at 31 (1993).

ARGUMENT

This Court should grant certiorari for two main reasons. First, the Sixth Circuit's interpretation of the NVRA conflicts with its text, structure, and history. *Amici* have long interpreted the statute oppositely, and they helped the Justice Department negotiate settlements that would be illegal under the Sixth Circuit's view. Second, the Sixth Circuit's decision deprives Ohio and other jurisdictions of an important means to combat bloated voter rolls, a real and pressing threat to the integrity of federal elections.

I. The Sixth Circuit's interpretation of the NVRA is incorrect and contradicts the Justice Department's longstanding enforcement policy.

A. The Sixth Circuit's interpretation of the NVRA conflicts with the law's text, structure, and history.

The NVRA has two main goals: maximizing the number of eligible citizens on the voter rolls and minimizing the number of ineligible citizens on the voter rolls. *See* 52 U.S.C. § 20501(b). To minimize the number of ineligible voters, the NVRA requires states to adopt a "program" that removes registered voters who become ineligible "by reason of ... a change in the[ir] residence." *Id.* § 20507(a)(4)(B).

The NVRA limits how states can remove these now-ineligible voters—two of those limits are relevant here. First, under subsection (b)(2), states cannot adopt a program that "result[s] in the removal of the name of any

person ... by reason of the person's failure to vote." *Id.* § 20507(b)(2). Second, under subsection (d), states cannot remove voters without confirming that they actually have changed residences. *See id.* § 20507(d). A state can conclude that a voter changed residences, however, if he "fail[s] to respond to a notice" sent by the state and "has not voted or appeared to vote" in two consecutive federal elections. *Id.* § 20507(d)(1)(B).

At first blush, these limits may seem contradictory. Subsection (b)(2) prohibits states from removing voters "by reason of [their] failure to vote." *Id.* § 20507(b)(2). Yet subsection (d)'s notice procedure allows states to remove voters precisely because they failed to vote in consecutive federal elections. But the NVRA resolves this tension by clarifying that subsection (d)'s notice procedure does *not* "result in the removal of the name of any person ... by reason of the person's failure to vote" for purposes of subsection (b)(2):

> [A state program] shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except* that nothing in this paragraph *may be construed* to prohibit a State from using [subsection (d)'s notice procedure] to remove an individual from the official list of eligible voters if the individual—
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B)

> to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id. § 20507(b)(2) (emphases added).

The "except" clause of subsection (b)(2) was added by the HAVA in 2002. In using the word "construed," the except clause does not change the meaning of subsection (b)(2); it clarifies what subsection (b)(2) has always meant. *See Alden v. Maine*, 527 U.S. 706, 722-23 (1999) (explaining that the use of the word "construed" in the Eleventh Amendment means it was enacted "not to change" but to "address[] the proper interpretation of ... the original"). The notice procedure in subsection (d) *never* "result[ed] in the removal of the name of any person ... by reason of the person's failure to vote." Although the failure to vote (in two consecutive elections) is one requirement under the notice procedure, it is the voter's *failure to respond to the notice*—not his failure to vote—that ultimately leads to his removal from the voting rolls.

Another provision of the HAVA makes the same point. Section 21083 expressly incorporates the notice procedure of the NVRA. It explains the notice procedure this way: "[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). The use of the word "solely" is

telling. It confirms that, under the NVRA, a person's failure to vote can be *a* factor in removing him from the voter rolls. It just cannot be the *sole* factor.

This distinction is precisely the one that Congress meant to draw. Both the House and the Senate reports surveyed the state voter-registration policies existing at the time and explained how the NVRA would affect them:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. The "handful" of state programs that "remov[e] registrants from the list simply for not voting" were the ones the NVRA prohibited—not the majority of state programs that first "send a notice to assess whether the person has moved." H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46.

Ohio's Supplemental Process is not among the "handful" of programs the NVRA prohibited. Ohio sends a notice to anyone who fails to engage in any "voter activity"

for two years. If the voter does not respond to the notice and does not vote (or appear) in two consecutive federal elections—the two requirements in subsection (d) of the NVRA—Ohio cancels his registration. As Judge Siler recognized, "no voter is removed solely by reason of a failure to vote" under Ohio's Supplemental Process. Pet. App. 35a (Siler, J., dissenting). A voter is removed only if he fails to respond to the notice. And a voter can stay registered by engaging in any kind of voter activity during this four-year period. *See* Pet. 10.

The Sixth Circuit nevertheless held that Ohio's Supplemental Process violates subsection (b)(2) of the NVRA. The Sixth Circuit gave three reasons for reaching this conclusion. None is persuasive.

First, the Sixth Circuit noted that the "trigger" for the notices sent out under the Supplemental Process "is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a (majority opinion). But, as the district court explained, the word "'trigger'" is "nowhere to be found in the NVRA." *Id.* at 56a (district court opinion). The NVRA explains that subsection (d)'s notice procedure complies with subsection (b)(2), and it does not limit "the events that need or need not happen before a state may initiate" that notice procedure. *Id.* at 58a. No matter what trigger a state chooses, the removal of a voter under subsection (d)'s notice procedure is premised on the voter's failure to respond to the notice—not on his failure to vote.

Second, the Sixth Circuit reasoned that, if a state's use of subsection (d)'s notice procedure automatically satisfies subsection (b)(2), then subsection (b)(2) would be reduced to "mere surplusage." *Id.* at 17a (majority

opinion). After all, states are *required* to use subsection (d)'s notice procedure before they can remove a voter for changing his residence. *See id.* But this argument fails on multiple levels. For one, subsection (b)(2)'s prohibition on removing a voter solely for his failure to vote retains some "independent meaning" under Ohio's interpretation. *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 148-49 (1998). Unlike subsection (d), subsection (b)(2) is not confined to removal "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). No matter the meaning of subsection (d), then, subsection (b)(2) applies fully to the NVRA's other grounds for removal, including criminal conviction, mental incapacity, and death. *See id.* § 20507(a)(3)-(4).

Even in the context of changed residences, moreover, subsection (b)(2) is not superfluous. In the context of change-of-residence removals, subsection (d) and subsection (b)(2) are not two rules but one: together, they prohibit the practice of presuming that a non-voter has changed residences (and dropping him from the voter rolls) without first giving him notice. *See* H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. That Congress explained how this rule works in more than one provision is not surplusage; it is a helpful attempt to clarify how the statute operates. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007). Clarification was important because, as explained, it is not immediately obvious how subsection (b)(2) and subsection (d) coexist in the NVRA. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7 (1994) ("It is no superfluity for Congress to clarify what had been at best unclear ....").

Third, the Sixth Circuit invoked the "traditional rule" that a statute's exceptions should be "construed narrowly." Pet. App. 16a. But this "made-up canon" is illegitimate. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting). The Court has not invoked it consistently, *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 359-63 (2012), and it contradicts important principles of statutory construction, such as "'no legislation pursues its purposes at all costs'" and "[c]ongressional intent is discerned primarily from the statutory text," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

In any event, this canon cannot apply to the NVRA. The law serves *dual* purposes: increasing the registration of eligible voters and decreasing the registration of ineligible voters. *See* 52 U.S.C. § 20501(b). It is impossible to tell which purpose is the "general rule" and which purpose is the "exception." For example, the principle that a voter can be removed for failing to respond to a notice is framed as a rule, *see id.* §§ 20507(a)(4)(B); 21083(a)(4)(A), and as an exception, *see id.* § 20507(d)(1)(B). In subsection (b)(2), it is framed neither as a rule nor as an exception, but as a clarification. *Id.* § 20507(b)(2). Put simply, even if a canon that construes exceptions narrowly could ever be applied sensibly, it could not be applied sensibly here.

In sum, the Sixth Circuit's interpretation of the NVRA contradicts the law's text, structure, and history. The NVRA requires the states to remove individuals who change their residence from the voter rolls. To do so, the NVRA allows the states to remove any individual who does not respond to a notice and does not vote in two consecutive

federal elections; and it does not limit when the states can send those notices. Ohio's Supplemental Process follows this procedure. It complies with the NVRA.

B. The Sixth Circuit's decision contradicts the Justice Department's longstanding interpretation of the NVRA.

There is little support for the Sixth Circuit's interpretation of the NVRA. Indeed, *amici* have long taken the opposite view. When they were serving in the Civil Rights Division, the Justice Department *required* states to adopt procedures that are indistinguishable from Ohio's Supplemental Process. The Sixth Circuit's interpretation flouts this well-established history of enforcement.

For example, in 2007, the Justice Department sued the City of Philadelphia for violations of the NVRA, the HAVA, and the Voting Rights Act. *See* Am. Compl., *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2007 WL 1476781 (E.D. Pa. Apr. 26, 2007) [Dkt. No. 35]. With respect to the NVRA, the United States alleged that Philadelphia "fail[ed] to conduct a meaningful general program of voter registration list maintenance" and "d[id] not conduct a program that makes a reasonable effort to remove the names of ineligible voters." *Id.* ¶¶ 55-56. The parties ultimately settled. As part of that settlement, Philadelphia agreed to "send a forwardable confirmation notice to any registered elector who has not voted or appeared to vote during any election" and "remove inactive voters who fail to appear to vote during the period beginning with the date of the confirmation notice and ending after the second federal general election following the date of the

confirmation notice." Settlement Agreement ¶ 16, *United States v. Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007), *available at*, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/phila_settlement.pdf.

The settlement with Philadelphia was not an isolated agreement. During *amici*'s tenures, the Justice Department also negotiated similar agreements with the State of Indiana and Pulaski County, Arkansas. *See* Consent Decree and Order ¶ 4, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006) [Dkt. No. 4], *available at*, https://www.justice.gov/crt/consent-decree-and-order; Consent Order ¶¶ 4-8, *United States v. Pulaski County*, No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004) [Dkt. No. 9], *available at*, https://epic.org/privacy/voting/register/pulaski_cd.html.

All of these agreements required the defendants to adopt a program like Ohio's Supplemental Process. The defendants had to identify a list of nonvoters, send those nonvoters a notice asking them to confirm their address, and cancel the registration of voters who did not respond to the notice and did not vote in two consecutive federal elections. According to the Sixth Circuit, however, these agreements forced the defendants to violate federal law. *Amici* respectfully disagree. Because the Sixth Circuit's interpretation of the NVRA undermines these agreements and impugns this history of federal enforcement, it warrants this Court's review.

II. The Sixth Circuit's decision will undermine the states' efforts to maintain accurate voter rolls and to promote the integrity of elections.

Congress enacted the NVRA "to ensure that accurate and current voter registration rolls are maintained" and "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3)-(4). These objectives are complementary. "The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18. As this Court has recognized, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud," and "[a] good registration list will ensure that citizens are only registered in one place." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193-94 (2008) (opinion of Stevens, J.) (quoting Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005), goo.gl/6kCxRw). "[P]ublic confidence in the integrity of the electoral process," in turn, "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Programs like Ohio's Supplemental Process are an important tool in achieving these goals. Individuals who move to a new jurisdiction are no longer eligible to vote in their old jurisdiction and should not remain registered

there. Although states can track some of these voters through the Postal Service's change-of-address database, that data is underinclusive. Many people who change residences do not use this service. *See* Pet. 33-34. To maintain accurate voter rolls, states need to be able to use other reliable indicia of ineligibility—including a lack of voter activity.

Recent voter registration data justify Ohio's efforts. A 2012 Pew Study found major problems with the accuracy of voter rolls in the United States. According to the study, 24 million voter registrations (one out of every eight) are invalid or inaccurate. For example, 1.8 million deceased persons are listed as voters, and 2.75 million people are registered to vote in more than one state. *See* Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (2012), goo.gl/mQV8Ul. "Inflated voter lists are also caused by phony registrations and efforts to register individuals who are ineligible." Comm'n on Fed. Election Reform, *supra*. After the 2008 election, the Justice Department "sent letters to a dozen states inquiring about their list maintenance practices" because "there appeared to be significant imbalances between their numbers of registered voters and their citizen populations." U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* 38 (2009), goo.gl/xp7nhc (testimony of Christopher Coates, Acting Chief of the Voting Section).

As of 2016, thirty states participate in the Interstate Voter Registration Crosscheck Program (administered by the State of Kansas). This program analyzes the voter rolls of the participating states and identifies individuals who are registered in more than one state. As of February

2016, the Crosscheck Program revealed hundreds of thousands of voters who were potentially registered in multiple states. Of the twenty-five participating states analyzed in 2016, the following states had potential voter registration duplications with other participating states:

- Alabama – 220,247
- Arizona – 240,277
- Arkansas – 110,200
- Colorado – 257,413
- Georgia – 540,245
- Idaho – 20,834
- Illinois – 454,325
- Indiana – 452,577
- Iowa – 129,925
- Kansas – 123,502
- Kentucky – 311,126
- Louisiana – 119,207
- Massachusetts – 144,587
- Michigan – 406,268
- Mississippi – 162,288
- Missouri – 244,710
- Nebraska – 60,766
- Nevada – 85,968
- New York – 392,365
- North Carolina – 455,891
- Ohio – 386,092
- Oklahoma – 89,788
- South Dakota – 34,367
- Tennessee – 218,641
- Virginia – 284,618

Kan. Sec'y of State, *Grid of Potential Duplicate Registration Within States by DOB* (2016) (on file with counsel).

These efforts have led to numerous prosecutions. Using the Crosscheck data, in 2008 and 2010, Kansas referred fourteen instances of double voting for prosecution, and Colorado indicted or referred to the FBI ten instances of double voting. *See* Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013), goo.gl/FQwRvQ.

Similarly, the Heritage Foundation has identified 755 recent criminal convictions for voter fraud in the United States—many involving false registrations and double voting. *See* Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated Mar. 3, 2017), goo.gl/lIwvcM. Numerous convictions involve individuals who voted in more than one state. For example, Regina Beaupre pleaded guilty in 2015 to voting in the same election in both Arizona and in Michigan. *Id.* at 12. James and Karen Marshall voted in both Arizona and Kansas in 2008. *Id.* at 18. Michael Hannum pleaded guilty to voting in Nebraska and Kansas in 2012. *Id.* at 78. Ron Weems pleaded guilty to voting in both Colorado and Kansas in the 2012 and 2014 elections. *Id.* at 79. Steven Gaedtke was convicted of voting in both Arkansas and Kansas in 2010. *Id.* Wendy Rosen (a candidate for Congress in Maryland) pleaded guilty to voting in both Florida and Maryland in 2010. *Id.* at 92. Pasco Parker admitted to voting in Florida, North Carolina, and Tennessee in the 2012 general election. *Id.* at 183.

Other individuals were convicted of voting twice in different parts of the same state. In Arizona, eight individuals—David Culberson, Adam Hallin, John Hamrick, Gerald Sack, Steven Streeter, Jay Thompson,

Franklin Turner, and Jeffery Hitchcock—pleaded guilty to attempted double voting in the 2012 general election. *Id.* at 8-12. In New Hampshire, Derek Castonguay pleaded guilty to voting in Salem and Windham in the 2014 election. *Id.* at 169. In Wisconsin, Todd Murray was convicted of voting in both New Berlin and West Allis in the 2012 election. *Id.* at 229.

Still other individuals cast ballots on behalf of deceased relatives who were not removed from state voter rolls. In California, Mark Evans cast a ballot in the name of his deceased father-in-law. *Id.* at 21. In Oregon, Lafayette Keaton pleaded guilty to casting multiple ballots using his deceased son's and brother's identities. *Id.* at 195.

Accurate voter rolls are vital in the effort to combat voter fraud. Bloated rolls "create[] a potential for people to fraudulently vote under the names of these illegally registered individuals." U.S. Comm'n on Civil Rights, *supra*, at 12 (executive summary of Coates's testimony). Efforts like Ohio's Supplemental Process not only comply with the NVRA; they are essential to achieving its purposes.

CONCLUSION

For all these reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit.

Respectfully submitted,

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JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GEORGIA AND 14 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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2A *Sutherland Statutory Construction* § 47:11 (7th ed.) 16

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 10, 17, 21

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Gallup, *381 Million Adults Worldwide Migrate Within Countries* (May 15, 2013) 8

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Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 27 (Aug. 2001) 7

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Result in, Merriam-Webster Online Dictionary, http://www.merriam-webster.com (Feb. 4, 2017) 10

Result in, Oxford Dictionary of Phrasal Verbs (1st ed. 1993) 10

S. Rep. No. 103-6 (1993) 20

The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade* (Feb. 2012) 8

U.S. Census Bureau, *Americans Moving at Historically Low Rates* (Nov. 16, 2016) 8

U.S. Postal Serv., Office of the Inspector Gen., Report No. MS-MA-15-006, *Strategies for Reducing Undeliverable as Addressed Mail* (May 1, 2015) 8

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* (5th ed. 1984) 13

INTEREST OF AMICI CURIAE

Georgia and the other amici States—Alaska, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia—seek clarity regarding their obligations under the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511.[1]

To protect the integrity of the electoral process, the NVRA requires each State to "conduct a general program that makes a reasonable effort to remove" from its voter-registration list the name of any person who has moved or passed away. *Id.* § 20507(a)(4). It then subjects States to two seemingly conflicting mandates. It prohibits them from removing a person's name "by reason of the person's failure to vote." *Id.* § 20507(b)(2). And it also prohibits them from removing a person's name on the ground that the person has moved *unless* the person fails to respond to an address-confirmation notice and then also *fails to vote* in the next two consecutive general elections for federal office. *Id.* § 20507(d)(1)(B).

The court of appeals resolved the tension between those two mandates by interpreting the NVRA to categorically prohibit States from considering failure-to-vote data except when expressly required to do so by the NVRA itself. Applying that rule, the court held

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[1] Amici provided timely notice of their intent to file this brief to the parties' counsel of record. *See* Sup. Ct. R. 37.2(a). Amici were not required to seek leave to file this brief. *See* Sup. Ct. R. 37.4.

that the State of Ohio violated the NVRA by using failure-to-vote data to identify registered voters who may have moved, and then sending address-confirmation notices to those voters. According to the court, a State may not use failure-to-vote data as a "trigger" for sending address-confirmation notices.

For the reasons explained below, amici believe the court of appeals misinterpreted the NVRA. But just as important, amici seek clarity regarding the steps they may take to meet their obligation under the NVRA to maintain accurate voter-registration lists. Accordingly, amici respectfully urge the Court to grant Ohio's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

With the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511, Congress sought, among other things, "to protect the integrity of the electoral process" and "to ensure that [States maintain] accurate and current voter registration rolls." 52 U.S.C. § 20501(b)(3)-(4). Advancing those related purposes, the NVRA requires each State to "conduct a general program that makes a reasonable effort to remove" from its voter-registration rolls the name of any person who has moved or passed away. *Id.* § 20507(a)(4). It then gives States instructions about how to conduct their list-maintenance programs. Four of those instructions create the knot that must be untangled here.

(1) The "Failure-To-Vote Clause" provides that a State's list-maintenance program "shall not result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." *Id.* § 20507(b)(2).

(2) The "Clarification Amendment"—which was added to the NVRA by the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, 1728—provides that "nothing in [the Failure-To-Vote Clause] may be construed to prohibit a State from . . . remov[ing] an individual from the official list of eligible voters if the individual" fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. 52 U.S.C. § 20507(b)(2).

(3) The "Safe-Harbor Process" provides that a State "may" use "change-of-address information supplied by the Postal Service . . . to identify registrants whose addresses may have changed." *Id.* § 20507(c)(1)(A).

(4) And the "Confirmation Procedure" provides that a State "shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence" unless the person fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. *Id.* § 20507(d)(1)(B).

Looking to those four provisions, the court of appeals held that the Failure-To-Vote Clause categorically prohibits States from considering failure-to-vote

data, but also that the Clarification Amendment creates an exception to that prohibition. App.14a-15a, 20a-21a. The exception, according to the court, permits States to consider failure-to-vote data as required by the Confirmation Procedure itself. App.14a-15a, 20a-21a. The court then acknowledged that the NVRA does not mandate the Safe-Harbor Process, and in fact permits the use of other processes to identify registrants who may have moved. App.4a, n.2. But applying its reading of the Failure-To-Vote Clause, the court held that Ohio violated the clause by using failure-to-vote data to identify registrants who may have moved, and then sending address-confirmation notices to those registrants. App.20a-24a. In other words, according to the court, a State may use failure-to-vote data as required by the Confirmation Procedure itself, but may not use that data to trigger the Confirmation Procedure. App.20a-24a.

The Court should grant certiorari for two reasons.

First, the question presented—whether States may use failure-to-vote data to trigger the Confirmation Procedure—is of ongoing importance to the States.

Second, the court of appeals misinterpreted the NVRA. The NVRA does not categorically prohibit States from considering failure-to-vote data. It instead incorporates a statute-specific proximate-cause standard that only prohibits States from removing a person's name from a voter-registration list based *solely* on the person's failure to vote. Indeed, the plain language of both the as-enacted NVRA and the

later-added Clarification Amendment require that reading, as does any clear-eyed review of the relevant legislative history.

ARGUMENT

I. The Court should grant certiorari because the petition raises an important question.

The Court should grant certiorari because the petition raises a question of ongoing importance to the States. Three points make that plain.

First, the question presented will tax the States until the Court answers it. In the last five years, advocacy groups have sued at least nine separate governmental entities for failing to adequately maintain their voter-registration lists.[2] But in just the last two years, other advocacy groups have sued Ohio and Georgia for

[2] *See, e.g.*, Compl., *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792 (S.D. Ohio filed Aug. 30, 2012), ECF No. 1; Compl., *ACRU v. Walthall Cty., Miss. Election Comm'n*, No. 2:13-cv-86 (S.D. Miss. filed Apr. 26, 2013), ECF No. 1; Compl., *ACRU v. Jefferson Davis Cty., Miss. Election Comm'n*, No. 2:13-cv-87 (S.D. Miss. filed Apr. 26, 2013), ECF No. 1; Compl., *ACRU v. McDonald*, No. 2:14-cv-12 (W.D. Tex. filed Jan. 27, 2014), ECF No. 1; Compl., *ACRU v. Martinez-Rivera*, No. 2:14-cv-26 (W.D. Tex. filed Mar. 27, 2014), ECF No. 1; Compl., *ACRU v. Clark Cty., Miss. Election Comm'n*, No. 2:15-cv-101 (S.D. Miss. filed July 27, 2015), ECF No. 1; Compl., *ACRU v. Noxubee Cty., Miss. Election Comm'n*, No. 3:15-cv-815 (S.D. Miss. filed Nov. 12, 2015), ECF No. 1; Compl., *ACRU v. Montalvo*, No. 7:16-cv-103 (S.D. Tex. filed Mar. 4, 2016), ECF No. 1; Compl., *ACRU v. Snipes*, No. 0:16-cv-61474 (S.D. Fla. filed June 27, 2016), ECF No. 1.

employing list-maintenance programs that allegedly use failure-to-vote data to trigger the Confirmation Procedure,[3] and have threatened to sue other States that employ similar procedures, *see, e.g.*, Letter from Stuart C. Naifeh, Senior Counsel, Demos, to Hon. Tre Hargett, Tenn. Sec'y of State (Oct. 20, 2016), https://goo.gl/lnsfoD. These suits—and their conflicting allegations of voter fraud and voter removal—have taxed the States. They have presented real dollar costs to the States, which have been forced to defend themselves from attacks on two fronts. And they have received substantial media coverage, which has undermined the public's confidence in our electoral process.

Moreover, the States face a real threat of additional litigation. Those States that fail to adequately maintain their voter-registration lists will eventually be embroiled in litigation. But those States that use failure-to-vote data to trigger the Confirmation Procedure face a more immediate threat: The court of appeals' decision will now be used against them. In addition to Ohio and Georgia, at least eleven other States arguably use failure-to-vote data to trigger the Confirmation Procedure: Alaska, Florida, Illinois, Iowa, Missouri, Montana, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and West Virginia.[4] And

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[3] Compl., *Ohio A. Philip Randolph Inst. v. Husted*, No. 2:16-cv-303 (S.D. Ohio filed Apr. 6, 2016), ECF No. 1; Compl., *Common Cause v. Kemp*, No. 1:16-cv-452 (N.D. Ga. filed Feb. 10, 2016), ECF No. 1.

[4] *See* Alaska Stat. Ann. § 15.07.130(a)-(b); Fla. Stat. Ann. § 98.065(2)(c); 10 Ill. Comp. Stat. Ann. §§ 5/4-17, 5/5-24, 5/6-58; Iowa Code § 48A.28(2)(b); Mo. Ann. Stat. §§ 115.181(2), 115.193;

seven others arguably leave open that possibility by delegating to state or local officials the authority to determine what will trigger the Confirmation Procedure: Arkansas, Kentucky, Louisiana, Mississippi, Nevada, North Carolina, and South Carolina.[5] In short, a great deal more litigation is likely. The Court could—and should—prevent the harms that will flow from that additional litigation by granting Ohio's petition and answering the question it presents.

Second, the question presented addresses an ongoing election-integrity issue. As a commission co-chaired by former Presidents Ford and Carter explained, "inaccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit 'repeaters' to use such available names." Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 27 (Aug. 2001), https://goo.gl/BGOq0Y. Yet even in the face of those risks, States struggle to maintain accurate voter-registration lists. According to a 2012 study, about "24 million—one of every eight—voter registrations in the United States are no longer valid or are

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Mont. Code Ann. §§ 13-2-220(1)(c)(iii), 13-2-402(7); Okla. Stat. Ann. tit. 26, § 4-120.2(A)(6), (B); 25 Pa. Cons. Stat. Ann. § 1901(b)(3), (d); R.I. Gen. Laws §§ 17-9.1-26, 17-9.1-27(b); S.D. Codified Laws §§ 12-4-19, 12-4-19.1; Tenn. Code Ann. § 2-2-106(c); W. Va. Code Ann. § 3-2-25(j); *cf.* Kan. Stat. Ann. §§ 25-2316c(d)(2), 25-2354(a) (permitting targeted mailings).

[5] Ark. Const. amend. 51, §§ 10(d)-(e), 11(a)(1); Ky. Rev. Stat. Ann. § 116.112(3); La. Stat. Ann. § 18:193(A); Miss. Code Ann. § 23-15-153(1); Nev. Rev. Stat. Ann. § 293.530(1); N.C. Gen. Stat. Ann. § 163-82.14(a); S.C. Code Ann. § 7-5-330(F)(1).

significantly inaccurate," and about "2.75 million people have registrations in more than one state." The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade* 1 (Feb. 2012), https://goo.gl/EZZ9J4. Those numbers are startling, and emphasize the importance of the election-integrity question presented by the petition.

Third, the question presented will enable the Court to decide what steps States may take to maintain accurate voter-registration lists. The United States is "one of the most mobile countries in the world." Gallup, *381 Million Adults Worldwide Migrate Within Countries* (May 15, 2013), https://goo.gl/rY9XC5. Indeed, even though Americans are moving at historically low rates, more than 35 million Americans—or 11.2 percent of the population—moved in 2016 alone. *See* U.S. Census Bureau, *Americans Moving at Historically Low Rates* (Nov. 16, 2016), https://goo.gl/ZD77ey. Yet according to the U.S. Postal Service, "[a]s many as 40 percent of people who move do not inform the Postal Service" of that fact. U.S. Postal Serv., Office of the Inspector Gen., Report No. MS-MA-15-006, *Strategies for Reducing Undeliverable as Addressed Mail* 15 (May 1, 2015), https://goo.gl/vOyQDl. Those numbers demonstrate why Ohio's list-maintenance process and those like it are so important to maintaining accurate voter-registration lists. Because so many people fail to submit a change-of-address form to the U.S. Postal Service, the Safe-Harbor Process proves inadequate. Based on the U.S. Postal Service's own data, the Safe Harbor

Process captures, at best, 60 percent of people who move. Ohio's process picks up where the Safe-Harbor Process leaves off, and serves as an effective tool for maintaining an accurate voter-registration list. The Court should take the opportunity offered by the petition to decide whether the NVRA permits Ohio's process and those like it.

II. The Court should grant certiorari because the decision below is obviously wrong.

The court of appeals made a series of small mistakes that culminated in an obviously flawed interpretation of the NVRA. The Court should grant certiorari to correct that obviously flawed interpretation.

A. The court of appeals violated the ordinary-meaning canon.

The court of appeals grounded its interpretation of the Failure-To-Vote Clause in an error by failing to apply the contextually appropriate ordinary meaning of the term "result."

The Failure-To-Vote Clause provides that a State's list-maintenance program "shall not *result in* the removal of the name of any person from the official list of voters . . . *by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

The court of appeals began its analysis of the clause by defining the term "result." App.20a-21a.

Relying on an out-of-circuit decision that quoted a dictionary definition of the term, the court defined "result" to mean "to proceed or arise as a consequence, effect, or conclusion." App.21a (citation and internal quotation marks omitted).

But that definition fails to capture the proper meaning of the term. The ordinary-meaning canon requires courts to "assume the contextually appropriate ordinary meaning" of a term. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012); *see also Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (noting that a word "takes on different meanings in different contexts"). But the court of appeals ignored context. It adopted the definition of the intransitive verb "result," even though the Failure-To-Vote Clause employs the transitive verbal phrase "result in." *See* 52 U.S.C. § 20507(b)(2). And, important here, the transitive verbal phrase does not mean "to proceed or arise as a consequence, effect, or conclusion," but instead means "to cause (something) to happen" or "to produce (something) as a result." *Result in*, *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com (Feb. 4, 2017); *see also Result in*, *Cambridge Phrasal Verbs Dictionary* (2d ed. 2006) (defining "result in" as "to cause something to happen, or to make a situation exist"); *Result in*, *Oxford Dictionary of Phrasal Verbs* (1st ed. 1993) (defining "result in" as to "have (sth) as an outcome or consequence").

Applying the contextually appropriate ordinary meaning of "result," the Failure-To-Vote Clause provides that a State's list-maintenance program "shall

not *result in*"—*i.e.*, cause or produce—"the removal of the name of any person from the official list of voters . . . *by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

B. The court of appeals violated the prior-construction canon.

The court of appeals then compounded its initial error by substituting the term "result" for the phrase "by reason of," and thus also substituting its own flawed definition of "result" for the Court's prior constructions of "by reason of."

Looking to its own flawed definition of "result," the court held that a State violates the Failure-To-Vote Clause when "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." App.21a (alterations in original) (citation omitted). The court thus incorporated the boundless but-for or factual causation standard into the clause, and interpreted it to categorically prohibit consideration of failure-to-vote data. *See* App.14a-15a, 20a-21a.

But that interpretation fails to capture the proper meaning of the clause. The court, in fact, rewrote the clause. It inserted its own flawed definition of "result" where the Failure-To-Vote Clause uses the phrase "by reason of." *Compare* App.21a, *with* 52 U.S.C. § 20507(b)(2). That substitution was unexplained and unwarranted. It was also consequential: "result" does not carry the same meaning as "by reason of." The phrase "by reason of" is a term of art that, as this Court

has repeatedly held, incorporates the narrow proximate-cause standard. *See, e.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-36 (1983); *see also Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 221-22 (2012). Because this Court had "settled the meaning of" the phrase before the NVRA was enacted, Congress's "repetition of the same language in" the Failure-To-Vote Clause indicated an "intent to incorporate" that settled meaning. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Accordingly, the court should not have substituted "result" and its own flawed definition of that term for "by reason of," but should have looked instead to this Court's pre-NVRA constructions of "by reason of" and incorporated the proximate-cause standard into the Failure-To-Vote Clause.

Applying the Court's prior constructions of "by reason of," the Failure-To-Vote Clause provides that a State's list-maintenance program "shall not *result in*"—*i.e.*, cause or produce—"the removal of the name of any person from the official list of voters . . . *by reason of*"—*i.e.*, as a proximate cause of—"the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

The proximate-cause standard "is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Courts have implemented that policy-based judgment with various formulas. *Id.* at 693, 701. Some

have required a "direct relation between the injury asserted and the injurious conduct alleged," and excluded any "link that is too remote, purely contingent, or indirec[t]." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (alteration in original) (citation and internal quotation marks omitted). Others have applied various tests, including "the immediate or nearest antecedent test; the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, or foreseeable consequence test." *CSX Transp.*, 564 U.S. at 701 (citations and internal quotation marks omitted). And still others have "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 65, p. 452 (5th ed. 1984) (noting the "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury")).

But under any of the various formulations of the standard, Ohio's list-maintenance process does not "result in" (*i.e.*, cause or produce) the removal of a person's name from the official list of voters "by reason of" (*i.e.*, as a proximate cause of) that person's failure to vote. Removal is not, for instance, *directly related* to a person's failure to vote, because it is *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice sent as part of the Confirmation Procedure. A person's failure to respond to the address-confirmation notice is, in other

words, the *immediate* and *nearest antecedent* of removal, and a person's failure to vote is in any event not the *sole* proximate cause of removal.

C. The court of appeals violated the interpretive-harmony canon.

Viewed from a different perspective, the court of appeals' failure to apply the ordinary-meaning and prior-construction canons caused it to violate the interpretive-harmony canon.

The court recognized that interpreting the Failure-To-Vote Clause to categorically prohibit consideration of failure-to-vote data led to a conflict because the Confirmation Procedure affirmatively requires consideration of failure-to-vote data. *See* App.14a-15a. The court attempted to resolve that conflict by pointing to the Clarification Amendment. It held that, "under the [Clarification Amendment's] plain language," the Confirmation Procedure "is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote." App.15a.

But that line of reasoning contains an obvious flaw: it is anachronistic. As enacted in 1993, the NVRA included both the Failure-To-Vote Clause and the Confirmation Procedure. *See* National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 83-84. The Clarification Amendment, however, was not introduced into the NVRA until 2002. *See* Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728. Accordingly, under the court's reading, from 1993 until

2002, the Failure-To-Vote Clause categorically prohibited conduct that the Confirmation Procedure affirmatively required, and the conflict between those two provisions was open and irreconcilable.

Of course, there could not have been an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure from 1993 to 2002. No court would have knowingly permitted that result because, when interpreting a statute, the "task is to fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959). The court of appeals did not attempt to fit all parts of the as-enacted NVRA into an harmonious whole. To the contrary, it needlessly rendered the Failure-To-Vote Clause in conflict with the Confirmation Procedure. It could have—and should have—employed the prior-construction canon to incorporate the proximate-cause standard into the Failure-To-Vote Clause, because with that standard incorporated, the Failure-To-Vote Clause rests harmoniously alongside the Confirmation Procedure. Indeed, even within the Confirmation Procedure, removal is not *directly related to* a person's failure to vote, because it is *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice, and a person's failure to vote is in any event not the *sole* proximate cause of removal.

Moreover, if the court had honored the interpretive-harmony canon by incorporating the proximate-cause standard into the Failure-To-Vote Clause, it would

have reached a different result in this case. That follows because, as demonstrated above, Ohio's list-maintenance process does not result in (*i.e.*, cause or produce) the removal of a person's name from the official list of voters "by reason of" (*i.e.*, as a proximate cause of) that person's failure to vote. *See supra* pp. 12-14.

D. The court of appeals interpreted a proviso as if it were an exception.

The court of appeals' reliance on the Clarification Amendment to resolve the supposed conflict between the Failure-To-Vote Clause and the Confirmation Procedure led to an additional error: the court interpreted the Clarification Amendment as an exception to a general prohibition when in fact it is a proviso that modifies that prohibition.

Although "there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification," there is a "technical distinction between an exception and a proviso." *United States v. Cook*, 84 U.S. 168, 177 (1872) (footnote omitted). "A true statutory exception exists only to exempt something which would otherwise be covered by an act." 2A *Sutherland Statutory Construction* § 47:11 (7th ed.). Provisos, by contrast, function as rules of construction and are thus "commonly used to limit, restrain, or otherwise modify the language of the enacting clause." *Quackenbush v. United States*, 177

U.S. 20, 26 (1900); Scalia & Garner, *supra*, at 154 (noting that a proviso "modifies the immediately preceding language").

The court of appeals failed to recognize that technical but important distinction. Although the court referred to the Clarification Amendment as both a proviso and an exception, App.14a-19a, it never considered the possibility that the amendment functions as a rule of construction, and instead interpreted and applied it as if it were an exception to a general prohibition, App.18a, 20a.

That mistake was easy to make. The Clarification Amendment begins with the phrase "except that," 52 U.S.C. § 20507(b)(2), which suggests that the amendment should be read as an exception to a general prohibition. But the phrase misleads. In fact, because poor drafting is common, the "particular form of the words used to introduce the applicable provision generally does not determine whether it should be classed a proviso or an exception." 1A *Sutherland Statutory Construction* § 21:11 (7th ed.). Instead, the function of a provision determines whether it is a proviso or an exception.

By that standard, the Clarification Amendment rests comfortably in the proviso camp. Its plain language confirms that it functions as a rule of construction. It provides that "nothing in [the Failure-To-Vote Clause] *may be construed* to prohibit" certain conduct. 52 U.S.C. § 20507(b)(2) (emphasis added). In addition, the amendment was plainly intended to be a rule of

construction that clarified the meaning of the Failure-To-Vote Clause. As enacted, the heading that preceded the amendment read, "*clarification* of ability of election officials to remove registrants from official list of voters on grounds of change of residence." Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728 (emphasis added) (capitalization omitted); *see also* H.R. Rep. No. 107-730, pt. 1, at 81 (2002).

That reading is also confirmed by the Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). In *DeBartolo*, the Court interpreted a provision that, like the Clarification Amendment, included a "shall not be construed" command. 485 U.S. at 582. The Court rejected an interpretation that treated "the proviso as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Id.* It noted that the proviso had "a different ring to it" because it included the "shall not be construed" command. *Id.* Then, consistent with the argument made above, the Court interpreted the proviso as a "clarification" of a general ban "rather than an exception to a general ban." *Id.* at 586. That line of reasoning applies here as well.

If the court of appeals had properly interpreted the Clarification Amendment as a proviso, it would have reached a different result in this case. If nothing else, the Clarification Amendment clarifies that the Failure-To-Vote Clause *does not* categorically prohibit consideration of failure-to-vote data. There is, moreover, a refreshing and reassuring regularity here. The

prior-construction canon, the interpretive-harmony canon, and a proper interpretation of the Clarification Amendment each require the same interpretation of the Failure-To-Vote Clause. That is, they each require that the clause be interpreted to incorporate the proximate-cause standard. *See supra* pp. 11-19. And as already demonstrated, under any of its various formulations, the proximate-cause standard requires a different result in this case. *See supra* pp. 12-14.

But now take one step further. The Court has recognized that common-law formulations of the proximate-cause standard varied, *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693, 701 (2011), but also that the standard is sometimes statute-specific, *id.* at 700; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) ("Proximate-cause analysis is controlled by the nature of the statutory cause of action."). Is there reason to believe that the Failure-To-Vote Clause embodies a statute-specific proximate-cause standard? Absolutely.

The Failure-To-Vote Clause does not prohibit—and per the Clarification Amendment may not be construed to prohibit—a State from considering a person's failure to vote if the State also considers the person's failure to respond to an address-confirmation notice. That is, after all, the Confirmation Procedure. The Failure-To-Vote Clause thus only prohibits—and per the Clarification Amendment may only be construed to prohibit—a State from relying *solely* on failure-to-vote data. That reading is consistent with the common-law formulation of the proximate-cause

standard that "cut off liability if a 'proximate cause' was not the *sole* proximate cause," *CSX Transp.*, 564 U.S. at 693 (citation omitted), and is confirmed by the HAVA, which expressly states the proximate-cause standard in those terms: "no registrant may be removed *solely by reason of* a failure to vote," 52 U.S.C. § 21083(a)(4)(A) (emphasis added); *see Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (noting that the *in pari materia* canon provides that statutes that "pertain to the same subject" should be read "as if they were one law" (citation omitted)). In addition, Congress enacted the Failure-To-Vote Clause to prohibit States from removing registrants from the official list of registered voters based *solely* on their failure to vote. As the legislative history demonstrates, the clause was intended to "prohibit states from removing registrants from the list simply for not voting." H.R. Rep. No. 103-9, at 30 (1993); *see also* S. Rep. No. 103-6, at 46 (1993).

In sum, the Failure-To-Vote Clause incorporates a statute-specific proximate-cause standard that prohibits a State conducting a list-maintenance program from relying *solely* on failure-to-vote data. That is the prohibition.

E. The court of appeals misapplied the surplusage canon.

One last point. The court of appeals repeatedly insisted that interpreting the Failure-to-Vote Clause to prohibit only those list-maintenance programs that fail to comply with the Confirmation Procedure "would

reduce the . . . clause to mere surplusage." App.17a; *see also* App.17a-18a, 23a. But that is simply false. The Confirmation Procedure governs *only* when a State removes a registrant's name from its voter-registration list "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). When a State removes a registrant's name based on other criteria, *see, e.g.*, *id.* § 20507(a)(4)(A) (death), the NVRA does not require the Confirmation Procedure, and the Failure-To-Vote Clause stands alone as a prohibition on removing the registrant's name based solely on failure-to-vote data. Moreover, even if that were not true, the surplusage canon "cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true." Scalia & Garner, *supra*, at 176. That follows because "drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." *Id.* at 176-77. The court of appeals' analysis, then, was driven by an improper application of, and an improper understanding of, the surplusage canon.

CONCLUSION

The Court should grant Ohio's petition.

Respectfully submitted,

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RECORD AND 1 BRIEF

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No. 16-980

IN THE
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,
v.
A. PHILIP RANDOLPH INSTITUTE NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance. Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Judicial Watch has a major and particular interest in the issues at stake in this litigation, deriving from its own prior NVRA litigation against Ohio. Judicial Watch filed a federal lawsuit under Section 8 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507, in 2012 against Ohio Secretary of State Jon Husted.[2] In that complaint, Judicial Watch alleged that Ohio had been failing to make a reasonable effort to maintain the accuracy

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief more than ten days prior to the date it was due.

[2] *Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. A, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37, available at https://www.scribd.com/doc/304449069/Complaint-Ohio-NVRA.

and currency of its voter rolls in violation of the NVRA. *Id.* at 25. Judicial Watch argued that its members were injured due to Ohio's alleged failure to maintain accurate voter rolls. Specifically, Judicial Watch alleged Ohio's violations undermined Judicial Watch members' confidence in the legitimacy of Ohio elections, causing them doubt whether their votes would be cancelled out by votes cast in the name of outdated registrations, thereby discouraging them from voting to begin with. *Id.* at 32-33.

Judicial Watch litigated its case against Ohio for over sixteen months. Judicial Watch attorneys spent over 400 hours trying the case, incurring significant unrecovered legal fees in addition to out-of-pocket litigation expenses, including expert fees, local counsel fees, court costs, deposition costs, and travel costs. In January of 2014 the parties settled the lawsuit, agreeing to terms for Ohio to perform certain NVRA Section 8 list maintenance practices through November 2018.[3] A key provision of this Settlement Agreement was Ohio's agreement to perform an annual list maintenance "Supplemental Mailing" to voters who had no contact with Ohio's

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[3] January 10, 2014 Settlement Agreement ("Settlement Agreement"), *available at* https://www.judicialwatch.org/wp-content/uploads/2014/01/01-14-Ohio-Voter-Rolls-Settlement.pdf; *see Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. B at 39, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37 (Settlement Agreement; First Amendment to Settlement Agreement).

election offices in two years.[4] The Settlement Agreement required Ohio to send the Supplemental Mailing every year, whereas Ohio had previously been sending the mailing every *two* years. The Supplemental Mailing portion of the Settlement Agreement was so important to the parties that they subsequently negotiated an amendment solely to give Ohio greater flexibility over which month of the year to initiate the Supplemental Mailing. *Id.* at 44.

Judicial Watch never would have agreed to the Settlement Agreement with Ohio and dismissed its lawsuit if it believed that the Supplemental Mailing was legally impermissible. If the Sixth Circuit's ruling in this case is allowed to stand, this key provision of Judicial Watch's Settlement Agreement could be voided. This would undermine Judicial Watch's extensive efforts to protect the integrity of elections for its Ohio members. Judicial Watch therefore has a significant interest in the subject matter of this litigation, along with a genuine organizational interest in protecting its members' voting rights and ensuring that its past efforts have not been wasted.

Judicial Watch also has an institutional interest in the cause of election integrity. This interest is shared with the people of all states whose electoral laws have been put in question by the Sixth Circuit's flawed decision. In this case in particular, if Ohio's voter rolls are not maintained in a current and accurate condition consistent with the NVRA, Ohio citizens could have their votes diluted or cancelled

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[4] *Id.* at 41.

out by unlawful ballots cast in the names of outdated or duplicate registrations. Public confidence in the integrity of the electoral process is an important interest, shared in this case by the State and people of Ohio as well as by Judicial Watch. *See Judicial Watch v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) ("If the state has a legitimate interest in preventing that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm.").

SUMMARY OF ARGUMENT

The structure of Section 8 of the National Voter Registration Act of 1993 (NVRA), makes it clear that states are assigned the primary responsibility for ensuring that their voter rolls contain only eligible voters. 52 U.S.C. § 20507. The statute gives states considerable discretion to determine what measures will constitute the reasonable efforts necessary to comply with Section 8. In particular, the NVRA says nothing about what sorts of events would warrant the sending of a statutorily prescribed notice to a voter who is believed to have moved elsewhere. A 2002 amendment to Section 8, moreover, clarified that the statute's restriction on removing a voter for failing to vote did *not* apply to removals under the subsection dealing with that statutory notice.

In enjoining Ohio's Supplemental Process, the Sixth Circuit's 2-1 ruling misapplied principles of statutory construction in a way that inverted the plain meaning of Section 8. The Sixth Circuit contended that reading the 2002 amendment to

create an exception for state procedures like Ohio's Supplemental Process would render the language of that amendment superfluous. In fact, the 2002 amendment merely clarifies what had been an apparent conflict in the NVRA, whereby Sections 8(b) and 8(d) seemed to say different things about whether a voter could be removed for failing to vote. The Sixth Circuit's argument also ignored the meaning supplied by the structure of the entire statute, which indicates that states are free to send confirmation notices on any nondiscriminatory and uniform basis.

As it exists, Ohio's Supplemental Process allows the sending of a statutory confirmation notice to any registrant has not had any voting-related activity for two years. After that, the registrant may be removed from the rolls if there is no response or further activity for two general federal elections. The Sixth Circuit further erred by holding that this sequence of events amounts to removing a voter *for* failing to vote. To the contrary the failure to vote only leads to the sending of a notice. Subsequent removal is due to the failure to respond to that notice for a period of time that may extend up to four years. The Sixth Circuit's attempt to argue otherwise relies on a misuse of the plain language of the NVRA.

The Sixth Circuit's decision affects the interests of the voters and government of the State of Ohio; Judicial Watch, which has an NVRA-related Settlement Agreement with the State; other states whose electoral laws are now in peril; and the people of the United States, who grow ever more jaded

about the integrity of their electoral system. The Sixth Circuit's error should be rectified by the Court.

ARGUMENT

I. The Sixth Circuit's Interpretation of the NVRA is Counter-Textual.

A. The Plain Language of the NVRA Allows States to Decide How to Conduct List Maintenance and When to Send a Registrant a Confirmation Notice.

Section 8, the "integrity" provision of the NVRA, requires states to maintain accurate voter rolls. 52 U.S.C. § 20507; *see* 52 U.S.C. § 20501(b)(3) and (4) (NVRA's stated purposes include "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter rolls are maintained."); S. Rep. 103-6 at 17-18, 103rd Cong., 1st Sess. (1993) (extolling "accurate and up-to-date voter registration lists").

The core requirement of Section 8 is the mandate that "each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." *Id.*, § 20507(a)(4). This provision does not list any particular steps that a "general program" must incorporate, or specify exactly how a state should go about complying. Rather, by its plain language, it only requires that states make a "reasonable effort." The precise meaning of this clause is subject to interpretation by state

legislatures and, ultimately, by federal courts. *See United States v. Missouri*, 2007 U.S. Dist. LEXIS 27640 at *19, 2007 WL 1115204 (W.D. Mo. 2007), *aff'd in part, rev'd in part on other grds.*, 535 F.3d 844 (8th Cir. 2008) ("The NVRA does not define 'reasonable effort' and the Court has found no authority that describes the parameter of the terms.").

The rest of Section 8 makes sense in the context of the fact that the statute does not describe what a state must do to comply. Accordingly, Section 8(b) provides that, whatever else such an effort might entail, it must meet certain baseline requirements. First, a state's effort must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). And second, it must not remove a person from the voter rolls "by reason of the person's failure to vote." *Id.*, § 20507(b)(2). In 2002, that provision was modified to add that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections [8](c) and [8](d)" to remove ineligible voters from the rolls.

Section 8(c), again implicitly recognizing the indeterminate nature of NVRA compliance, provides that states "may" meet their list maintenance obligations by using "change-of-address information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A). Finally, Section 8(d) provides that, unless they confirm in writing that they have moved, registrants may not be removed from the rolls for changing addresses unless they fail to respond to a

statutory notice (the "confirmation notice") *and* fail to vote during the time period defined by the next two general federal elections. *Id.*, § 20507(d)(1), (2).

Subject to the foregoing restraints, the NVRA allows states wide latitude in designing a "general program that makes a reasonable effort" to remove ineligible registrants from the rolls. 52 U.S.C. § 20507(a)(4). Of particular relevance here is the fact that *the NVRA says nothing about the kinds of events that states may rely on as grounds for sending confirmation notices to those who are believed to have moved.* All that the NVRA requires is that a confirmation notice must be sent prior to the commencement of the statutory waiting period of two general federal elections. *Id.*, § 20507(d)(1)(B)(ii). There is simply no basis for reading any other requirements into the statute. *See Ill. Pub. Telcoms. Ass'n v. FCC*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) ("we will not read into the statute a mandatory provision that Congress declined to supply"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) (omitted-case canon); *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation.") (citation omitted); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.") (citations omitted); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citations omitted).

Accordingly, the NVRA would not prevent Ohio from sending confirmation notices every year to every registrant in the State, although this undoubtedly would be quite expensive. It is equally clear that the NVRA would not prohibit Ohio from sending confirmation notices on a "uniform" and "nondiscriminatory" basis to any meaningful subset of the foregoing, for example, to residents who have ceased filing state tax returns, which may suggest that they have moved. In the same vein, nothing in the NVRA prohibits Ohio from sending a confirmation notice to all registered voters who have not engaged in any voter activity in the preceding two years, per the State's "Supplemental Process." The State's leeway to do so is fully consistent with the design of the NVRA, which generally accords states a great deal of freedom in crafting their list maintenance programs. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) ("the plain meaning of [a] statute" depends on "the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citations omitted).

Finally, the conclusion that Ohio may use any reasonable basis to trigger the sending of confirmation notices is only made more compelling by the 2002 amendment to the NVRA. That amendment made it clear that the bar contained in Section 8(b) on any removal from the rolls "by reason of [a] person's failure to vote" did *not* apply to a removal for failing to respond to a confirmation notice. *Id.*, § 20507(b)(2).

B. The Sixth Circuit's Ruling Disregards the Plain Meaning of Section 8 of the NVRA.

In holding that the NVRA proscribes Ohio's Supplemental process, the Sixth Circuit misapplied canons of statutory construction and ultimately mandated an outcome that disregards, and even is contrary to, the plain meaning of Section 8.

The Sixth Circuit was first compelled to explain the 2002 amendment to the NVRA. This amendment qualified Section 8's proviso that no one could be removed from the voter rolls "by reason of [their] failure to vote," by adding that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in," *inter alia*, Section 8(d), to remove a voter from the rolls. 52 U.S.C. § 20507(b)(2). In other words, Section 8(b)(2) was amended precisely in order to make clear that state procedures – like Ohio's Supplemental Process – that involved sending Section 8(d) confirmation notices were *not* proscribed by that paragraphs' other restriction on removals for failure to vote. This amendment seems to bar the very arguments made by Respondents below and accepted by the Sixth Circuit.

In response to this point, the Sixth Circuit contended that reading Section 8(b)(2)'s exception as a "mere reiteration" of Section 8(d)(1) would make the exception superfluous, contrary to accepted canons of statutory construction. App. 18a. Accordingly, the Sixth Circuit concluded that the

amendment must have been intended to apply the prohibition it contained to all statutes. App. 20a. By this reasoning, the 2002 amendment was seen to specially refer to – rather than to specially except – statutes like Ohio's Supplemental Process.

In the course of its reasoning the Sixth Circuit misapplied the statutory canon regarding superfluous language. Prior to its amendment, the NVRA merely provided that no person may be removed from the rolls "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). However, two subsections down from that clause, the NVRA provided that a person who has changed residence and who has failed to respond to a confirmation notice may be removed if he or she "has not voted or appeared to vote . . . in an election during the period beginning on the date of the notice and ending after the date of the second general Federal election." *Id.*, § 20507(d)(1)(B)(ii).

These provisions appear openly to conflict. Perhaps a reviewing court would have found the proper way to reconcile these provisions using appropriate canons of statutory construction. In any event, the 2002 amendment removed all doubt, resolving the conflict by clarifying that that Section 8(b) did not bar the use of Section 8(d) to remove ineligible registrants. Statutory language that clarifies a provision is not superfluous. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("The phrase 'any other person' performs a significant function simply by clarifying that subparagraph (B) excludes the persons enumerated

in subparagraph (A)."). The Court in *Atlantic Research Corp.* also issued a pertinent warning, when it observed that "our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." *Id.* The Sixth Circuit has adopted just such a "dubious construction," insisting that language plainly intended to exempt the use of confirmation notices was actually meant to include and refer to them.

The Sixth Circuit's next innovation is even more misguided. After determining that Section 8(b)(2) did not contain an exception for procedures like the Supplemental Process, the Court asked whether that process "result[s] in the removal" of voters for failing to vote. App. 21a (internal citation and quotation omitted). In finding that it does, the Sixth Circuit defined "result" as strict, but-for causation, however attenuated. *Id.*

That interpretation is not consistent, however, with the "ordinary meaning" of the words of the statute. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (citations and internal quotations omitted). In ordinary language, when it is said that one event is the "result" of another, the initiating event is usually the one closest in time to the caused event. To put it more concretely, it ordinarily would be said that the Supplemental Process "resulted in" a confirmation notice being sent. In turn, the failure

to respond to that confirmation notice, along with the passage of time until the second general federal election, "resulted in" a registrant being removed from the rolls. No one in ordinary speech uses the terms "result" or "cause" or "consequence" to refer back indiscriminately and equally to all prior causes, however remote, in a causal chain. Ordinary speech limits the reference by a sense of nearness.

And lawyers have a word for this. "The term 'proximate cause' is 'shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.'" *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment) (citation omitted). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Id.* (citation omitted). Applying this principle here, the proximate cause of the removal of voters under the Supplemental Process is their failure to respond to a confirmation notice, along with the passage of a statutory period of time. Registrants are *not* removed for failing to vote.

To reach the conclusions that it did, the Sixth Circuit majority engaged in a needlessly convoluted analysis of the language of Section 8. Circuit Judge Siler, who dissented from the majority's approach to the NVRA, had it right when he observed that "[t]his seems to be a much simpler process than as outlined in the majority opinion." App. 33a.

> The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four consecutive years, including two consecutive Federal elections following that notice.

App. 34a.

II. It is Important that the Court Address this Issue Now.

The Court's guidance urgently is needed to restore the meaning and efficacy of the NVRA. The correct interpretation of Section 8 of that statute has significant consequences for the State and people of Ohio, for Judicial Watch, for other states whose electoral statutes are placed at risk by the Sixth Circuit's flawed interpretation, and for the people of the United States, who share a common interest in electoral integrity.

Ohio has a legitimate interest in fostering election integrity by removing ineligible voters from the rolls. As the Court has observed:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and

> accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford v. Marion County Election Board, 553 U.S. 181, 196 (2008).

For its part, Judicial Watch is institutionally devoted to the cause of election integrity. This interest was clearly demonstrated when Judicial Watch sued the State of Ohio in 2012 under Section 8 of the NVRA for an alleged failure to conduct proper list maintenance. In January 2014, the parties executed a Settlement Agreement resolving the matter, which expires on November 10, 2018. *Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. B, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37. The centerpiece of that Settlement Agreement is a provision requiring the sending of confirmation notices on an annual basis to voters who have not engaged in voting-related activity for a two-year period. *Id.* at 41, 44. The legal status of this provision obviously is called into doubt by the Sixth Circuit's ruling. Moreover, the fact that a crucial term may be invalid renders the status of the entire Settlement Agreement questionable, as it is not clear that Judicial Watch has received its bargained-for consideration. Certainly the value of the agreement

to Judicial Watch is considerably diminished. As a practical matter, these developments raise the real prospect of further litigation.

The Sixth Circuit's ruling calls into question the previously settled electoral laws of a number of other states. Most obviously, it affects the State of Georgia, which has been sued over a similar statute. *See Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. 2016). But it also is likely to lead to lawsuits in other states, especially given the fact that the Sixth Circuit's decision undermines the use of voter inactivity anywhere "in the chain" of events leading up to the cancellation of a registration. In Montana, election administrators are required to conduct list maintenance procedures every other year, and one of their options is "a targeted mailing," which may be a forwardable confirmation notice, to voters who failed to vote in the preceding federal general election. MONT. CODE ANN. § 13-2-220(1)(c) (2015). In Missouri, election officials conduct canvasses every two years, and may canvass all voters, or "only those voters who did not vote in the last general election." MO. REV. STAT. § 115.181 R.S. Mo. (2016). Tennessee law requires that, where a voter fails to vote or update his or her registration over a period of two consecutive November elections, the county must mail a confirmation notice. TENN. CODE ANN. § 2-2-106(c). West Virginia law provides that in addition to the NCOA procedure, all counties using the NCOA information from the U.S. Postal Service "shall also, once each four years . . . conduct the same procedure by mailing a confirmation notice

to those persons . . . who have not updated their voter registration records and have not voted in any election during the preceding four calendar years." W.VA. CODE § 3-2-25(j) (2016). Nor is Judicial Watch able to represent here that the foregoing list is exhaustive.

Finally, a ruling resolving the dispute about the correct operation of the NVRA is in the interest of the people of the United States. It is easy to find polls and surveys showing that Americans have little faith in the integrity of their elections and postulating that this partly explains low voter turnout.[5] Restoring public confidence in the integrity of elections is in the national interest. In *Crawford*, aside from states' interest in preventing fraud, the Court identified this second important interest, namely, "public confidence in the integrity of the electoral process," which "has independent significance, because it encourages citizen participation in the democratic process." 553 U.S. at 197; *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *see also Doe v. Reed*, 561 U.S. 186, 197 (2010) (the "State's interest in preserving the integrity of the electoral process" was

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[5] *See, e.g.*, Pippa Norris, Holly Ann Garnett and Max Grömping, *Why Don't More Americans Vote? Maybe Because They Don't Trust U.S. Elections*, Wash. Post, December 26, 2016, available at goo.gl/zAXsiW .

"particularly strong with respect to efforts to root out fraud," citing *Crawford* and *Purcell*).

CONCLUSION

For the foregoing reasons, *amicus* Judicial Watch respectfully request that the Court grant the petition for a writ of certiorari.

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In The
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF LANDMARK LEGAL FOUNDATION[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner State of Ohio. For reasons stated herein, Landmark respectfully requests the Court grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ensuring the integrity of the vote is a fundamental obligation of our government. It is crucial that citizens have confidence in the electoral process. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Voter fraud "breeds distrust of our government" and "drives honest citizens out of the democratic process." Id. Since the advent of our republic, the individual states have played an

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Nor person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

integral role in ensuring open and fair elections. Article I, Section 4 vests the states with authority to set the "Times, Places and Manner of holding Elections for Senators and Representatives. . . ." U.S. Const. Art. I, § 4. As Madison stated at Virginia's ratifying convention:

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.

3 Debates on the Adoption of the Federal Constitution 367 (J. Elliot ed. 1876) (James Madison, Virginia).

Local and state control of the election process preserves liberty. "The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome." H.R. Rep. No. 107-329, pt. 1, at 32 (2001). This dispersal of responsibility creates on the states and localities an obligation to maintain accurate and up-to-date voter rolls.

The state of Ohio ensures its voter rolls are accurate and up-to-date by a process enacted in 1994. 145 Ohio Laws 2516, 2521 (1994). Ohio's registration list maintenance process is consistent with the limitations

established by Congress. The Sixth Circuit, however, incorrectly ruled the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") do not permit Ohio's supplemental list maintenance program. Pet. App. 1a-37a. In short, the lower court incorrectly concluded that the NVRA's general prohibition of removing individuals from voter registration lists for failure to vote invalidated the state's supplemental list maintenance program. Id. Ohio does not remove individuals from voting lists for failing to vote, but rather for not responding to inquiries prompted by a carefully constructed registration confirmation plan. The Sixth Circuit misapprehends Ohio's program and the lower court's ruling must be reversed.

Granting *certiorari* presents the Court with the opportunity to address an important issue of both constitutional and statutory interpretation pertaining to the NVRA and HAVA. Is a voter list maintenance program that uses a voter's inactivity as a justification to deliver a confirmation notice to that voter valid under the NVRA and HAVA?

The legislative history of the NVRA and HAVA indicates that Congress both understood and reaffirmed the power of states to ensure the integrity of their voter rolls. Congress balanced the need to increase voter turnout with the need to preserve the integrity of the election process by authorizing states to conduct periodic voter list maintenance activities. In enacting the NVRA, Congress established a system whereby states

could develop and implement a system to ensure ineligible names are removed from the voter rolls. HAVA further clarified the process by which states could operate these systems.

Ohio's supplemental program comports with both statutes.

ARGUMENT

I. Congress designed the NVRA and HAVA to balance the interests between ballot integrity and ballot access.

The NVRA and HAVA work in concert to ensure elections are fair and accurate. The NVRA establishes procedures to increase "the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). HAVA, enacted in response to voting issues in the 2000 presidential election, generally imposes minimal election standards on states and provides federal assistance to states to ensure election officials "count every citizen's vote, count it accurately and be able to report it quickly." *Mark up of H.R. 3295, The Help America Vote Act of 2001 Before the H. Comm. on House Administration*, 107th Cong. 5-6 (2001) (statement of Steny Hoyer, Ranking Minority Member.)

Various proposals designed to establish a national voter registration system followed the enactment of

the Voting Rights Act of 1965. Royce Crocker, Cong. Research Serv., R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects* (2013). These included efforts during the 1970s and 1980s to establish a national "postcard" registration system and election-day registration. Although the Senate and House held several hearings on the issue, no bills reached the floor of either body. Id. In the 1988 presidential election, voter turnout reached its lowest point in 40 years with just slightly over 50% of the voting-age population casting votes. Id. In response to low turnout and "as a continuation of the long-standing efforts by proponents of registration reform, at the beginning of the 101st Congress, several bills were introduced to reform voter registration procedures." Id. After several efforts failed, the 103rd Congress passed and President Clinton signed into law the NVRA. Id.

A. The NVRA compels states to conduct a program to maintain accurate voter lists.

The NVRA obligates states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists" of registered voters. 52 U.S.C. § 20507(a)(4). HAVA obligates states to "ensure that voter registration records in the State are accurate and are updated regularly. . . ." 52 U.S.C. § 21083(a)(4). The NVRA and HAVA require states to remove individuals who have become ineligible because of change of residence. The language of subsection 52 U.S.C. § 20507(b)(2) of the NVRA was

appended by HAVA to clarify Congress's intention that an individual shall not be removed from the voter rolls solely by reason of failure to vote. *See* 52 U.S.C. § 21083(a)(4)(A).

The NVRA governs how applicable states conduct voter registration and voter list maintenance for federal elections. Among other things, Congress enacted the NVRA to "increase the number of eligible citizens who register to vote" while protecting "the integrity of the electoral process" by ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). This focus on ballot integrity was key to passage.

Section 8 of the NVRA applies to state voter list maintenance procedures for federal elections. 52 U.S.C. § 20507. It obligates states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in residence of the registrant, in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). A state's program to ensure the maintenance of accurate and current voter registration rolls "shall be uniform" and "nondiscriminatory." 52 U.S.C. § 20507(b)(1). It shall also, "not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote. . . ." 52 U.S.C. § 20507(b)(2).

Congress recognized the "legitimate administrative concerns of election officials" when crafting the

NVRA. S. Rep. No. 103-6 at 3 (1993). These concerns included, "the detection and prevention of fraud, the maintenance of accurate and up-to-date voter rolls, and the removal of the names of ineligible persons from the rolls." Id. The "mobility of our population" makes these tasks "particularly difficult" for state election officials. Id.

The NVRA was, therefore, the culmination of the need to balance the "legitimate administrative concerns" of election officials with the need to enhance "participation of eligible citizens as voters in elections for Federal office." Id. at 1. Congress intended that the NVRA "ensure that once a citizen is registered to vote, he or she should remain on the voting rolls." Congress, however, was also aware that opening the registration process "must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis." Id. at 17-18. The NVRA thus requires states to maintain the integrity of the voter rolls by making "a reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence." Id. at 18. States are authorized to maintain their voter roll integrity by conducting a maintenance program in conformance with the provisions described in Section 8.

Congress also noted that the NVRA did not mandate any specific time periods for utilizing list maintenance procedures. Id. at 20. The provisions pertaining to voter removal were intended to become irrelevant as technology improved and registration roll maintenance became more streamlined:

> While these provisions have been included to insure that voting rolls will be free from "deadwood," there will be less need for these mailing because the programs of voter registration include provisions for automatic updating of addresses. Thus, the process of updating registration rolls is an ongoing and continuous process.

Id.

Despite Congress's best intentions, jurisdictions failed to ensure their voting rolls would be free from "deadwood." The removal process specified in Section 8 failed to effectively ensure accurate voter lists. In 2001-2002, for example, a number of states reported that they faced challenges in maintaining accurate lists. Federal Election Commission, *The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2001-2002*, 2 (2003). This and a number of other factors spurred Congress to act.

B. HAVA provided clarification to states that operate voter list maintenance programs.

Issues surrounding the 2000 presidential election and the recount sparked legislative action. Recounts and voting registration issues in 2000 had shaken the public's confidence in the election system:

> Uncertainty reigned in our democracy. Public confidence in our election system was shaken.

> The United States of America, the most technologically advanced Nation in the world, had not fulfilled its most basic election duty, the duty to count every citizen's vote, count it accurately and be able to report it quickly.

Mark up of H.R. 3295, The Help America Vote Act of 2001, 107th Cong. 5-6 (2001) (statement of Rep. Bob Ney, Chair).

It was estimated that during the 2000 election 2 million votes went uncounted with another 3 to 4 million votes that were not cast because of registration problems. Id. at 6.

To address these problems, Congress heard extensive testimony from election officials and election technology experts. Legislators in Congress proposed as many as 50 bills involving campaign finance reform or election reform. *Federal Election Reform Before the H. Comm. on House Admin.*, 107th Cong. 3 (2001) (statement of Rep. Steny H. Hoyer, Ranking Minority Member). Congress addressed these issues by enacting HAVA.

Congress designed HAVA to address the "disconnects" that arose following enactment of the NVRA between voter registration systems such as DMV or social services agencies and election officials. Id. at 8 (statement of Doug Lewis, Director, The Election Center). These included voter files that had become "inflated" in states such as Kansas due to mandatory compliance with NVRA. Id. at 14 (statement of Connie Schmidt, Election Commissioner, Johnson County

Kansas). NVRA implementation also had resulted in the problem of duplicate registration, attributable to a massive influx of registration data and a failure of individuals to notify election officials those individuals had moved. *Voting Technology Hearing Before the H. Comm. on House Admin.*, 107th Cong. 16 (2001).

The fraudulent registration process, where identical voters appeared on multiple voting lists because those individuals are not removed, concerned Congress:

> The other problem is, of course, that people are not purged from the list when they move from one jurisdiction and register in another jurisdiction. They can easily vote in both places and it would not be detected under any system we have now. So I just wanted to lay that issue out clearly.

Id. at 17-18 (2001) (statement of Rep. Vernon J. Ehlers).

Congress further identified the voter registration process as particularly vulnerable to fraud:

> I think the greatest opportunity for fraud, is in voter registration; and we need to pay much more attention to voter fraud there and ensuring that voting lists are good, that we purge them regularly; that when someone moves, they can't keep registration at their former address and so forth.

Hearing on Technology and the Voting Process Before the H. Comm. on House Admin., 107th Cong. 39 (2001) (statement of Rep. Vernon J. Ehlers).

Expanding on the issue of the effect of a mobile population on the accuracy of voter rolls, the final report from the House Committee on Administration found:

> People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income groups, who are more likely to move than higher-income groups within the same state.

H.R. Rep. No. 107-329, pt. 1, at 36 (2001).

After considering input from experts in voting technology and state election officials, Congress agreed to impose seven minimum standards to protect the integrity of the voting process while respecting the important role states and localities play. HAVA imposed upon the states the implementation of a statewide registration system that would be networked to every jurisdiction within the state. HAVA also obligates states to implement a "system of file maintenance which ensures that the voting rolls are accurate and updated regularly." *Mark up of H.R. 3295, The Help America*

Vote Act of 2001, 107th Cong. 3 (2001) (statement of Rep. Bob Ney, Chair).

Congress designed HAVA, in part, to ensure voting rolls are accurate and updated on a regular basis by clarifying the NVRA's procedures for removal of ineligible registrants. Id. at 4. Removal from the voter rolls would only occur provided a registrant did not vote for at least two consecutive federal elections and failed to respond to a notice. When commenting at the markup hearing for the HAVA, the following exchange occurred:

> [Congressman Doolittle]: I understand everything until we get to the phrase, which says, "except that no registrant may be removed solely by reason of the failure to vote." And that seems to me to kind of muddy the water to what it said prior to that. So could I just ask what the effect of that is?
>
> The Chairman: Counsel is telling me you can't be removed simply because you haven't voted. *You have to have not voted and not responded to a notice.*

Id. at 12 (emphasis added).

Ranking minority member Representative Steny Hoyer further expanded on the issue raised by Congressman Doolittle:

> Mr. Hoyer: I think I understand what you are saying. If you read this two together, they both mean that you can't remove somebody for not voting solely. That is what the –

> Mr. Fattah: The gentleman suggested somebody should be removed from the rolls?
>
> Mr. Hoyer: That is what the National Voter Registration Act says, and therefore from your perspective if that causes you some concern, it doesn't add anything or detract anything, but from our standpoint it makes it clear that is the intent. That is what the current law is and we just wanted to indicate so we don't create a controversy outside this bill that frankly we don't need. We have got enough controversy as it is.

Id.

This sentiment is reflected in the final report from the House Committee on Administration:

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> > (A) A system of file maintenance which removes registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not voted in 2 or more consecutive general elections for federal office and who have not responded to a notice shall be removed from the official list of eligible voters, except that no

> registrant may be removed solely by reason of a failure to vote.

H.R. Rep. No. 107-329, pt. 1, at 36-37 (2001).

HAVA clarified the language from NVRA section 20507(b)(2) following the general rule prohibiting removal from the voter rolls for failure to vote:

> . . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual –
>
> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

52 U.S.C. § 20507(b)(2).

The amendment to the NVRA clarified any confusion regarding voter removal procedures. In the original HAVA legislation, the amendment is entitled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence." H.R. Rep. No. 107-730, pt. 1, at 81 (2001). Statements from legislators during hearings and markups show that states could only remove an individual from the voter rolls if the individual did not

vote *and* did not respond to a notice. Under HAVA, states are obligated to remove "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A).

Congress thus provided a roadmap for the states. Consistent with the NVRA and HAVA, an individual cannot be removed from the voter rolls solely for not voting. States can remove individuals if the individual has not voted and failed to respond to a notice.

II. Ohio's supplemental list maintenance process conforms to the text, history, and purpose of the NVRA and HAVA.

Ohio uses the supplemental process to identify electors "whose lack of activity indicates they may have moved, even though their names did not appear" in the change-of-address database. Cert. Pet. p. 10. Those individuals who have not voted for two years are sent confirmation notices. Id. Should the voter return the notice via prepaid mail or confirmation via the internet, the local board of election updates the voter's information. Id. Should the voter ignore the notice and fail to vote or update the voter's registration over the next four years, the board will cancel the registration. Id.

The supplemental process only removes individuals who *both* fail to respond to a notice *and* fail to either vote or update their registration for six years. The Sixth Circuit reversed the lower court's dismissal of a

challenge to Ohio's supplemental process. The Sixth Circuit erred when it concluded that the HAVA did not permit Ohio to use nonvoting as a "trigger." Pet. App. 15a-20a. Nothing in either the text or the legislative history of the HAVA suggests that Congress intended to exclude the type of supplemental program employed by Ohio. In fact, the extensive discussions regarding restoring and preserving the integrity of ballot system support the supplemental process.

Ohio has an obligation to ensure that its voter rolls are accurate. "The separate States have a continuing, essential interest in the integrity and accuracy used to select both state and federal officials." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2652, 2261 (2015) (Kennedy, J., concurring). When individuals move from a jurisdiction and fail to inform their respective election officials, those officials can take reasonable steps to determine whether the individual should continue to be on the voter rolls. The debates surrounding enactment of HAVA are clear: a voter cannot be removed from the voter rolls solely from failing to vote. An individual, however, must be removed from the voter rolls if that individual has failed to vote in two consecutive federal elections and has failed to respond to a notice.

Ohio's supplemental program is consistent with the text, purpose and history of the NVRA and HAVA. Certiorari will present the Court with the opportunity to reverse the Sixth Circuit's error.

CONCLUSION

For the reasons stated herein Landmark respectfully urges the Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE,
NORTHEAST OHIO COALITION FOR THE HOMELESS,
AND LARRY HARMON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

This case considers the steps that States may take to maintain accurate voter-registration lists under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). These laws bar States from removing "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote," but clarify that a State must remove a voter if the voter does not respond to a confirmation notice sent by the State and does not vote in the next two general federal elections. 52 U.S.C. §§ 20507(b)(2), 21083(a)(4)(A).

Since 1994, as part of its general list-maintenance program, Ohio has sent voters who lack voter activity over a two-year period the confirmation notice that the NVRA and HAVA both reference. If these voters do not respond to that notice and do not engage in any additional voter activity over the next four years (including two more federal elections), Ohio removes them from the list of registered voters and requires them to reregister if they otherwise remain eligible to vote. The Sixth Circuit held that this decades-old process violates § 20507(b)(2) because Ohio uses a voter's failure to vote as the "trigger" for sending a confirmation notice to that voter.

The question presented is:

Does 52 U.S.C. § 20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below (and Respondents here) are Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon.

Defendant-Appellee below (and Petitioner here) is Ohio Secretary of State Jon Husted.

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Wash. Rev. Code Ann. § 29.10.080 (Lexis 1993)..... 4

Wis. Stat. Ann. § 6.50(1) (Lexis 1993)..... 4

Wyo. Stat. Ann. §§ 22-3-115(a)(1), 22-3-116 (Lexis 1993)..... 4

OTHER AUTHORITIES

Am. Heritage Dictionary of the English Language (4th ed. 2000)..... 20, 39

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Chambers Dictionary of Phrasal Verbs (1996) 20

Chicago Manual of Style (15th ed. 2003)..... 20

138 Cong. Rec. 17,965-66 (1992) 49, 51

Thomas M. Cooley, *Law of Torts* (2d ed. 1888)..... 25

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot ed., 2d ed. 1836)..... 51

Robert J. Dinkin, *Voting in Provincial America* (1977)..... 50

Thomas Dyche & William Pardon, *A New General English Dictionary* (13th ed. 1768) 48

Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983) 28

Elections Assistance Comm'n, *Nat'l Mail Voter Registration Form* 34

Electronic Registration Information Center, Inc., *ERIC: Summary of Membership Guidelines and Procedures* 57

FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1997-1998, A Report to the 106th Congress* (June 30, 1999) 38

FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1999-2000, A Report to the 107th Congress* (June 30, 2001) 38

FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* (Mar. 1998) 8, 36

The Federalist (C. Rossiter ed., 2003) 49

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 55

Joseph P. Harris, Nat'l Mun. League, *Model Registration System* (2d ed. 1931) 3

Joseph P. Harris, Nat'l Mun. League, *Model Registration System* (4th ed. 1954) 3, 4

Joseph P. Harris, *Registration of Voters in the United States* (1929) 2, 3

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H.R. Rep. No. 107-730 (2002) 37

1 Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773) 48

Alexander Keyssar, *The Right to Vote* (2000) 2

McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs (2005) 20

Merriam-Webster's Collegiate Dictionary (11th ed. 2003) 39

Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001) 3

New Oxford Am. Dictionary (2001) 20

2 *The Records of the Federal Convention of 1787* (M. Farrand ed., 1911) 49

S. Rep. No. 103-6 (1993) 4, 29

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) .....*passim*

1 Joseph Story, *Commentaries on the Constitution of the United States* (1833) 48

U.S. Postal Serv., Office of the Inspector Gen., *Strategies for Reducing Undeliverable as Addressed Mail* (2015) 56

Voter Registration: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin., 103d Cong. 173 (Jan. 26, 1993) 29

Webster's New World Dictionary of the Am. Language (2d coll. ed. 1986) 34

OPINIONS BELOW

The Sixth Circuit's decision, Pet. App. 1a-37a, is reported at 838 F.3d 699. The district court's unreported decision granting judgment to Ohio Secretary of State Jon Husted, Pet. App. 39a-70a, is available at 2016 WL 3542450. Its unreported decision on remand, Pet. App. 71a-100a, is available at 2016 WL 6093371.

JURISDICTION

On September 23, 2016, the Sixth Circuit issued its decision. Justice Kagan granted a 45-day extension to file a petition for writ of certiorari. Secretary Husted filed a timely petition on February 3, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The National Voter Registration Act of 1993 (NVRA), Pub. L. 103-31, 107 Stat. 77, was codified at 42 U.S.C. §§ 1973gg to 1973gg-10, but is now codified at 52 U.S.C. §§ 20501-20511. The Help America Vote Act of 2002 (HAVA), Pub. L. 107-252, 116 Stat. 1666, was codified at 42 U.S.C. §§ 15301-15545, but is now codified at 52 U.S.C. §§ 20901-21145. This brief's appendix includes 52 U.S.C. §§ 20507 and 21083.

STATEMENT OF THE CASE

The "Elections Clause" provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Historically, Congress left these regulations to the States. *United States v.*

Gradwell, 243 U.S. 476, 483-85 (1917). The NVRA and HAVA, however, "erected a complex superstructure of federal regulation atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). This case considers the extent to which these statutes departed from a longstanding state practice: using a registrant's failure to vote as part of a program to maintain accurate registration lists.

A. Most States Traditionally Relied On The Failure To Vote To Maintain The Rolls

1. At the founding, States did not require electors to register. "In the early days, when the bulk of the population lived in rural communities, when almost every voter was personally known to his neighbors, and when there was comparatively little movement of population from one locality to another, the problem of determining those who were entitled to vote in a given election district was comparatively simple." Joseph P. Harris, *Registration of Voters in the United States* 4-5 (1929) ("Harris"). Voters simply "showed up at the polls with whatever documentary proofs (or witnesses) that might be necessary" to prove their qualifications to officials. Alexander Keyssar, *The Right to Vote* 151 (2000).

Most States shifted to registration in the second half of the 1800s after "the exposure of widespread election frauds, such as the voting of the graveyard, of persons who had moved away or died, of persons not qualified to vote, of fictitious names, sometime from fictitious addresses, and the voting of 'repeaters' under the names of qualified electors." Harris, *supra*, at 5-6. Early registration laws shared common traits. They often did not apply throughout the

State, instead centering on populated cities. Joseph P. Harris, Nat'l Mun. League, *Model Registration System* 11 (2d ed. 1931) ("Nat'l Mun. League 2d ed."); 1871 N.J. Laws 53, 53. And they often did not create permanent lists, instead requiring *all* electors to re-register regularly. Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001), *available at* goo.gl/CjONlS; 1915 Neb. Laws 382, 384-85.

These early laws were "attacked in the courts of almost every State" as unconstitutionally adding a registration qualification to the list of constitutional voting qualifications. Nat'l Mun. League 2d ed., *supra*, at 9. Courts split over that issue. *See Morris v. Powell*, 25 N.E. 221, 223-24 (Ind. 1890). Yet most States mooted it by passing constitutional amendments authorizing registration. Joseph P. Harris, Nat'l Mun. League, *Model Registration System* 51-52 (4th ed. 1954) ("Nat'l Mun. League 4th ed.").

Around the 1930s, "[t]he next wave of reform in voter registration concentrated on replacing periodic registration with permanent registration, to reduce costs and the opportunity for fraud." Nat'l Comm'n on Fed. Election Reform, *supra*, at 28. When switching to *permanent* lists, States confronted a practical problem: how to keep the lists up to date to ensure that registration served its antifraud purposes. To do so, States adopted list-maintenance programs tied to the failure to vote. Harris, *supra*, at 224-27. In the 1930s, the National Municipal League recommended using nonvoting to remove registrants as long as they received notice and an opportunity to remain registered. Nat'l Mun. League, *supra*, at 38-39. By the 1950s, "[c]ancellation for failure to vote

[had become] the principal means used in most permanent registration jurisdictions to purge the lists." Nat'l Mun. League 4th ed., *supra*, at 44.

In 1993, most States continued to use nonvoting in their list-maintenance efforts. S. Rep. No. 103-6, at 46 (1993). A few allowed officials to remove registrants solely for failing to vote without any notice.[1] The rest of these States required officials to send notices to nonvoters to give them a chance to stay on the voter rolls (or to reregister).[2]

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[1] Haw. Rev. Stat. § 11-17(a) (Lexis 1993); Idaho Code Ann. § 34-435 (Lexis 1993); Minn. Stat. Ann. § 201.171 (Lexis 1993); Mont. Code Ann. § 13-2-401 (Lexis 1993); N.J. Stat. Ann. §§ 19:31-5, 19:31-15 (Lexis 1993); Okla. Stat. Ann. tit. 26, § 4-120.2 (Lexis 1993); Utah Code Ann. § 20-2-24(1)(b) (Lexis 1992).

[2] Alaska Stat. § 15.07.130(b) (Lexis 1993); Ark. Const. amend. 51 § 11(a)(1) (Lexis 1991); Colo. Rev. Stat. § 1-2-224(3), (6) (Lexis 1993); Del. Code Ann. tit. 15, § 1704 (1991); Fla. Stat. Ann. § 98.081(1)-(2) (Lexis 1993); Ga. Code Ann. § 21-2-231(b) (Lexis 1993); 10 Ill. Comp. Stat. Ann. 5/4-17, 5/5-24, 5/6-58 (Lexis 1993); Ind. Code Ann. §§ 3-7-9-1, 3-7-9-2, 3-7-9-3, 3-7-9-5 (Lexis 1993); Iowa Code Ann. § 48.31 (Lexis 1993); Md. Code Ann. Art. 33 § 3-20(a) (Lexis 1993); Mich. Comp. Laws Serv. §§ 168.509, 168.513 (Lexis 1993); Miss. Code Ann. § 23-15-159 (Lexis 1993); Nev. Rev. Stat. Ann. §§ 293.540, 293.545 (Lexis 1993); N.M. Stat. Ann. § 1-4-28 (Lexis 1993); N.Y. Elec. Law § 5-406 (Consol. 1993); N.C. Gen. Stat. § 163-69 (Lexis 1993); Ohio Rev. Code § 3503.21 (1993); 25 Pa. Stat. Ann. §§ 623-40, 951-38 (Lexis 1993); R.I. Gen. Laws § 17-10-1(b) (Lexis 1993); S.C. Code Ann. §§ 7-3-20, 7-3-30 (Westlaw 1993); S.D. Codified Laws §§ 12-4-19, 12-4-19.1 (Lexis 1993); Tenn. Code Ann. § 2-2-106(a)(3), (b) (Lexis 1993); Vt. Stat. Ann. tit. 17, § 2150(d)(3)-(4) (Lexis 1993); Va. Code Ann. § 24.1-59 (Lexis 1992); Wash. Rev. Code Ann. § 29.10.080 (Lexis 1993); W. Va. Code § 3-2-3 (Lexis 1993); Wis. Stat. Ann. § 6.50(1) (Lexis 1993); Wyo. Stat. Ann. §§ 22-3-115(a)(1), 22-3-116 (Lexis 1993).

2. Ohio's history exemplifies these trends. An 1885 registration law required all voters in certain cities to register before every election, with registration open seven days. 82 Ohio Laws 232, 232-34 (1885). Litigants attacked the law as violating a constitutional provision setting qualifications. *Daggett v. Hudson*, 3 N.E. 538, 539 (Ohio 1885). The Ohio Supreme Court upheld the legislature's power to require registration, recognizing it as "efficacious to prevent fraud." *Id.* at 540-41. But the court invalidated the narrow registration window. *Id.* at 545-46.

In 1929, Ohio adopted its first *permanent* registration system for certain cities. 113 Ohio Laws 307, 321-22 (1929). This system required boards of election to cancel the registrations of those who had not voted for two years. *Id.* at 332. Boards sent individuals "a printed postcard notice of that fact." *Id.* In 1977, Ohio's legislature mandated permanent registration statewide. 137 Ohio Laws 305, 314 (1977). It also eliminated the rule removing individuals for nonvoting. *Id.* at 305. Ohio's citizens responded to the latter change with a constitutional amendment providing: "Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Ohio Const. art. V, § 1. Through 1993, therefore, boards continued to "cancel the registration" of those who had neither "voted at least once in the four" prior years nor updated their registration during that time. 144 Ohio Laws 5517, 5526 (1992). Thirty days before cancellation, boards sent notices about the impending cancellation directing individuals to update their registrations. *Id.*

B. Congress Passed The NVRA And HAVA To Increase Registrations, But Decrease The Number Of Ineligible Registrants

1. In 1993, Congress passed the NVRA to serve competing goals. Congress sought to "increase the number of eligible citizens who register to vote" in federal elections. 52 U.S.C. § 20501(b)(1). It indicated that "[d]iscriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 20501(a)(3). At the same time, Congress sought to "protect the integrity of the electoral process," and ensure "accurate and current" registration lists. *Id.* § 20501(b)(3)-(4); H.R. Rep. No. 103-9, at 5 (1993) ("The Committee felt strongly that no legislative provision should be considered that did not at least maintain the current level of fraud prevention.").

Increasing Registration. To advance its first goal, the NVRA required "States to provide simplified systems for registering." *Young v. Fordice*, 520 U.S. 273, 275 (1997). It compelled States to allow registration through motor-vehicle departments, the mail, and public offices. 52 U.S.C. §§ 20504-20506. It required States to leave registration open until 30 days before elections. *Id.* § 20507(a)(1). And it barred States from removing "registrants" from their rolls except for certain reasons—"at the request of the registrant"; "as provided by State law, by reason of criminal conviction or mental incapacity"; for "the death of the registrant"; or for "a change in the residence of the registrant." *Id.* § 20507(a)(3)-(4).

Removing Ineligible Registrants. To advance its second goal, the NVRA required States to maintain accurate registration lists. Four provisions are particularly relevant here.

First, § 20507(a)(4) (the "Maintenance Duty") directed States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" a registrant's death or changed residence. *Id.*

Second, § 20507(b) imposed limits on "State program[s] or activit[ies] to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office." Section 20507(b)(1) required maintenance efforts to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Section 20507(b)(2) (the "Failure-To-Vote Clause") originally provided that state programs or activities "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 107 Stat. at 83.

Third, § 20507(d) outlined ways that States could remove registrants for *changed residence*. It stated: "A State shall not remove the name of a registrant . . . on the ground that the registrant has changed residence unless": (1) the registrant confirms the move in writing or (2) the State follows a two-step process (the "Confirmation Procedure"). 52 U.S.C. § 20507(d)(1)(A)-(B). The Confirmation Procedure authorized States to remove registrants who *both* "failed to respond to a notice" sent by the State asking them to confirm their eligibility, *and* then did not

"vote[] or appear[] to vote" in two general federal elections. *Id.* § 20507(d)(1)(B)(i)-(ii). The notice had to be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address." *Id.* § 20507(d)(2). It needed to indicate, among other things, that the registrant would be removed if the registrant did not respond to the notice and vote in two federal elections. *Id.* § 20507(d)(2)(A).

Fourth, the NVRA neither required nor barred States from sending the notice identified in the Confirmation Procedure to any group of registrants. Yet § 20507(c)(1) (the "Safe-Harbor Provision") identified one group to whom States may send notices, as a safe harbor for satisfying their general Maintenance Duty. It noted that a State "may meet the requirements of subsection (a)(4)" by using "change-of-address information supplied by the Postal Service" to identify registrants who have moved. *Id.* § 20507(c)(1)(A). It directed States to send notices to registrants who have moved outside the jurisdiction and to remove them under the Confirmation Procedure. *Id.* § 20507(c)(1)(B)(ii).

2. As they had done before the NVRA, some States proposed sending notices under the Confirmation Procedure to nonvoters. FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, 5-22 (Mar. 1998). In the 1990s, the Department of Justice (DOJ) argued that this process violated the Failure-To-Vote Clause (§ 20507(b)(2)). *Id.*

HAVA made two changes affecting that debate.

Change One: HAVA included a section (the "Clarifying Amendment") that was entitled "clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence." 116 Stat. at 1728 (capitalizations omitted). This amendment added a disclaimer to the Failure-To-Vote Clause:

> except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id.

Change Two: Another HAVA section directed States to keep a "single, uniform, official, centralized, interactive computerized statewide voter registration list." 52 U.S.C. § 21083(a)(1)(A). One subsection required States to maintain a "system of file maintenance that makes a reasonable effort to remove registrations who are ineligible to vote from" that list. *Id.* § 21083(a)(4)(A). This subsection then stated: "Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office *shall* be removed from the official list of eligible voters, except that no registrant may

be removed *solely* by reason of a failure to vote." *Id.* (emphases added).

C. Ohio Has Long Conducted Two List-Maintenance Processes

After the NVRA, Ohio's legislature changed its registration laws. 145 Ohio Laws 2516, 2543-44, 2565 (1994); Ohio Rev. Code §§ 3501.05(Q), 3503.21(A)(7), (B)(1). It directed the Secretary of State to "prescribe procedures to identify and cancel the registration" of registrants who have moved. 145 Ohio Laws at 2543. Ohio's then-Secretary adopted two processes that have been in place ever since, spanning Secretaries of State from both political parties. Joint Stipulation, R.41, PageID#1506.

Following the Safe-Harbor Provision, the first process uses the postal service's change-of-address data. The postal service's database "contains the names and addresses of individuals who have filed changes of address with the United States Postal Service." *Id.* The Secretary compares that database with Ohio's registration database to identify registrants who might have moved. Boards of elections mail notices to these registrants. *Id.*, PageID#1506-07. If a registrant does not respond to a notice and does not engage in voter activity for four more years, the board cancels the registration. *Id.*, PageID#1508. This process misses any registrant who moves *without* notifying the postal service. *Id.*, PageID#1507.

Ohio thus uses a "Supplemental Process." *Id.* It "seeks to identify electors whose *lack of voter activity* indicates they may have moved, even though their names did not appear" in the change-of-address database. Brunner Directive 2009-05, R.38-7, Page-

ID#401. Boards send notices to registrants who have not engaged in voter activity for two years, asking them to confirm their eligibility. Joint Stipulation, R.41, PageID#1507. If registrants return the notice or respond through the internet, boards update their information. Damschroder Decl., R.38-2, PageID#295-96. If registrants ignore the notice and fail to vote or update their registration over the next four years, boards cancel the registration. *Id.* This process removes individuals who *both* fail to respond to the notice *and* fail to engage in voter activity for six years.

Until 2014, Ohio conducted these processes biennially. It now conducts them annually after a legislative change and a lawsuit challenging its maintenance efforts. Ohio Rev. Code § 3503.21(D); Settlement Agreement in *Judicial Watch v. Husted*, No. 2:12-cv-792 (S.D. Ohio), R.38-4, PageID#370.

D. A District Court Dismissed Plaintiffs' Suit, But The Sixth Circuit Reversed

1. In 2016, Ohio A. Philip Randolph Institute, the Northeast Ohio Coalition for the Homeless, and Larry Harmon ("Plaintiffs") sued the Secretary. Am. Compl., R.37, PageID#222-41. They alleged: (1) Ohio's Supplemental Process violated the NVRA, and (2) Ohio's notices lacked required information. *Id.*, PageID#236-38. In a spirt of compromise, the Secretary updated the notices. Notice, R.38-19, PageID#1365.

The district court entered judgment for the Secretary. Pet. App. 39a-40a & n.1. On Count 1, it held that the Failure-To-Vote Clause's "unambiguous text" (as clarified by HAVA's Clarifying Amendment)

"specifically permits" the Supplemental Process. Pet. App. 59a. The court also rejected Plaintiffs' argument that the Supplemental Process was "unreasonable" or "non-uniform." Pet. App. 59a-64a.

On Count 2, the court ruled that Plaintiffs' claim was largely mooted by the notice changes. Pet. App. 66a-67a. As to the sole contention that was not moot—that the NVRA required Ohio's notices to instruct registrants about registering in other States—the court held that the NVRA did not place this duty on States. Pet. App. 68a.

2. A split Sixth Circuit reversed. The court held that Ohio's Supplemental Process violated the Failure-To-Vote Clause (§ 20507(b)(2)). Pet. App. 10a-24a. It divided its analysis into two questions: Did the Clarifying Amendment permit the process? If not, did the Failure-To-Vote Clause prohibit it? Pet. App. 14a.

On the first question, the court ruled that the Clarifying Amendment did not insulate the Supplemental Process. Pet. App. 14a-20a. While the Confirmation Procedure authorized Ohio to remove voters who neither responded to a notice nor voted in two elections, the Supplemental Process tied the *initial* notice to nonvoting. Pet. App. 15a. Nothing in the Clarifying Amendment, the court suggested, permitted Ohio to use nonvoting as a notice "trigger." Pet. App. 15a-20a. To bolster its narrow reading of this amendment, the court also invoked the rule against superfluity and the principle that "exceptions to a statute's general rules be construed narrowly." Pet. App. 16a-18a.

On the second question, the court held that using voter inactivity as a "trigger" to send notices violated the Failure-To-Vote Clause. Pet. App. 20a-24a. "Under the ordinary meaning of 'result,'" the court reasoned, "the Supplemental Process would violate [this] clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." Pet. App. 21a (citation omitted). And while HAVA barred States from *removing* voters "solely" for nonvoting, the court held that the Supplemental Process did so because Ohio *sent notices* to registrants solely for nonvoting. Pet. App. 22a.

(Separately, the court reversed the district court on Plaintiffs' claims regarding the contents of Ohio's notices. Pet. App. 25a-31a. Secretary Husted did not appeal that aspect of the opinion.)

Dissenting, Judge Siler found that Ohio's procedure was lawful. Pet. App. 35a. He reasoned that the Supplemental Process comported with the Failure-To-Vote Clause because it did not remove voters *solely* for nonvoting. Pet. App. 32a-35a.

3. With the 2016 election pending, Secretary Husted opted not to seek en banc review, and agreed to a preliminary injunction requiring boards generally to count the ballots of voters whose registrations were cancelled under the Supplemental Process in 2011, 2013, or 2015. Pet. App. 95a.

Before the election, a Plaintiff suggested that "hundreds of thousands" of voters had been removed under the Supplemental Process in 2015, and that "1.2 million" may have been removed since 2011. *Amicus* Br. of Ohio A. Philip Randolph Inst. at 7-8, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct.

14 (2016) (No. 16A405). Yet about 7,515 ballots were cast during the election under this suit's provisional remedy (out of more than 150,000 provisional ballots and 5.6 million total ballots cast statewide). Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, *available at* https://goo.gl/KSZnCS.

SUMMARY OF ARGUMENT

The original NVRA, HAVA's amendments, and substantive canons of construction all establish that the NVRA permits Ohio's Supplemental Process.

I. As originally enacted, the NVRA's Failure-To-Vote Clause (§ 20507(b)(2)) permitted processes, like Ohio's process, that use the Confirmation Procedure to remove registrants.

A. The Failure-To-Vote Clause bars programs that "result in" the "removal" of individuals "by reason of" their failure to vote. To "result in" removal, a program must cause it. And, as this Court's cases suggest, the "by reason of" language clarifies that nonvoting must be the *proximate cause* of removal.

For two reasons, a failure to respond to a notice—not a failure to vote—is the sole proximate cause of removal under Ohio's Supplemental Process. *First*, the Court must read the NVRA as a harmonious whole. While the Failure-To-Vote Clause *bars* States from removing persons "by reason of" nonvoting, the Confirmation Procedure *requires* States to rely on nonvoting in order to remove them. Treating a failure to respond to the notice as the "sole proximate cause" of removal reconciles these provisions in a way that comports with background principles.

Second, the Court should not read the NVRA to "hide elephants in mouseholes." In 1993, most States sent notices to nonvoters requiring them to confirm their eligibility. If Congress meant to depart from that common practice, it would have done so expressly, not through implications. Yet the NVRA does not expressly regulate *who* may receive notices. The Court should read this silence as a delegation of authority to the States (not the federal judiciary).

B. The Sixth Circuit's reading of the Failure-To-Vote Clause lacks merit. It mistakenly adopted a broad test barring not just programs that make nonvoting a *proximate cause* of removal, but also programs that make nonvoting a *but-for cause* of removal. To do so, it ignored the clause's "by reason of" language. It also put the NVRA on a collision course with itself because removals authorized by the Confirmation Procedure would flunk this test.

In addition, the Sixth Circuit wrongly interpreted the Failure-To-Vote Clause as governing the *trigger* for notices, rather than the *removal* of registrants. The clause says nothing about notice "triggers." And the court's need to rewrite clear statutory text should have led it to reassess its broad causation test.

Finally, the Sixth Circuit claimed that its reading was necessary to avoid turning the Failure-To-Vote Clause into surplusage. It reasoned that the clause must govern notice "triggers" because the Confirmation Procedure *already* requires States to follow its two steps. That analysis ignored the different scopes of these provisions, which have independent force no matter how the Court rules here. The Confirmation Procedure governs removals only for *change of address*. The Failure-To-Vote Clause restricts removals

for failing to vote, and bars States from using nonvoting as the sole proxy to conclude that a registrant is ineligible for *other reasons* (e.g., death).

II.A. HAVA confirmed that States may send notices to nonvoters. *First*, its Clarifying Amendment states that "nothing in th[e] [Failure-To-Vote Clause] may be construed to prohibit States" from using the Confirmation Procedure to remove registrants. This text clarifies that the clause does not regulate notices *as long as* States follow the Confirmation Procedure. The amendment also had only one plausible purpose—to side with the States, not the DOJ, over whether they could send notices to nonvoters.

Second, another HAVA section *commanded* States to remove registrants if they did not respond to a notice and vote for two elections. Ohio's Supplemental Process would violate this section if it did *not* remove these registrants. This section also clarified that the NVRA bars States from removing registrants "solely" for nonvoting. Ohio does not remove registrants *solely* for nonvoting because they *additionally* must fail to respond to a notice.

B. The Sixth Circuit mistakenly interpreted HAVA. The Clarifying Amendment, said the court, clarified that the Failure-To-Vote Clause governs all parts of a program that the Confirmation Procedure does not expressly permit. This reads an amendment clarifying the clause's *limited* scope as *expanding* its scope. Further, the court read the clause to serve an implausible purpose—clarifying that the NVRA's Failure-To-Vote Clause does not outlaw the NVRA's Confirmation Procedure. Finally, the court mistakenly invoked the canon that exceptions to a statute's general rules be construed narrowly. The

Clarifying Amendment is not an "exception" to the Failure-To-Vote Clause, and, regardless, the Court should reject this canon.

Responding to HAVA's other section, the Sixth Circuit next held that Ohio *removes* registrants "solely" for nonvoting because it *sends notices* to nonvoting registrants. This wrongly treats a sending of a confirmation notice as a removal.

III. Two substantive canons of construction—canons that the Sixth Circuit overlooked—confirm that the NVRA should be interpreted to permit Ohio's Supplemental Process.

A. The canon of constitutional avoidance directs the Court to adopt a narrow reading of the Failure-To-Vote Clause. While the Elections Clause permits Congress to regulate the *times, places, and manner* of holding congressional elections, the Constitution generally leaves to the States the power to set *voting qualifications*. Some laws—such as a federal requirement to have one Election Day or a state citizenship requirement for voting—fall clearly within one or the other power. Yet the authority for other laws will not be so clear, because the States' power to prescribe qualifications broadly includes the power to enforce them, whereas Congress's power over the manner of elections serves a limited function.

The NVRA raises serious constitutional questions under this framework. *First*, Ohio's Supplemental Process at least *enforces* its residency qualification. Reading the NVRA to bar that process would amplify a significant constitutional issue: How far may Congress intrude on the States' enforcement power when ostensibly passing "manner" regulations? Indeed,

Ohio's process requires registrants merely to confirm their eligibility, something States have required of challenged electors since the founding.

Second, this Court has never authoritatively answered whether registration laws—including laws requiring registrants to register if they fail to vote over a certain time—amount to qualifications within the States' exclusive domain. That question, too, is a serious one, considering the historical debate over whether these laws qualify as qualifications.

Third, the NVRA governs presidential elections. The Elections Clause does not give Congress the authority to regulate those elections, and the Constitution leaves the manner of appointing the electors that choose the President to the States.

B. The clear-statement rule also directs the Court to uphold Ohio's Supplemental Process. To be sure, the Court does not start with a presumption against preemption in the Elections Clause context. Yet the Court should rely on federalism concerns to resolve any ambiguity in federal law that remains *after* it has applied the traditional tools of statutory interpretation. The Court presumes that Congress does not unnecessarily interfere with state election operations, and it has even interpreted the Elections Clause itself to protect state authority. Elections, moreover, are an area of traditional state concern. They also illustrate why the Court treats the States as laboratories of democracy. States have adopted an array of regimes to best balance the competing demands in this delicate area.

ARGUMENT

I. THE NVRA AUTHORIZES OHIO'S SUPPLEMENTAL PROCESS

Even in 1993, the NVRA allowed States to send notices to nonvoters, and to remove them if they failed to respond and to vote in two more elections. To reach the opposite result, the Sixth Circuit rewrote the NVRA's Failure-To-Vote Clause and created a conflict with its Confirmation Procedure.

A. The Failure-To-Vote Clause And Confirmation Procedure Permit States To Send Notices To Nonvoters

The Failure-To-Vote Clause prohibits only programs that make nonvoting a proximate cause of removal. The Confirmation Procedure shows that a failure to respond to a notice breaks this required causal connection between nonvoting and removal.

1. Nonvoting must be a proximate cause of removal under the Failure-To-Vote Clause

The Failure-To-Vote Clause states that a "program or activity" (a subject) shall not "result in" (a phrasal verb) the "removal" (an object) of a person from the rolls "by reason of the person's failure to vote" (a prepositional phrase). 52 U.S.C. § 20507(b)(2). This text mandates a proximate-cause connection between nonvoting and removal.

Program Or Activity. The clause's subject shows that the clause governs "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal

office." *Id.* This text covers systematic "programs" and one-time "activities." A program commonly means "[a]n ordered list of events to take place or procedures to be followed." *Am. Heritage Dictionary of the English Language* 1401 (4th ed. 2000); *cf. New Oxford Am. Dictionary* 1361 (2001). Section 20507 references these "programs." The Maintenance Duty in § 20507(a)(4) requires States to maintain a general "program" to remove ineligible registrants. Section 20507(c)(2)(A) sets time limits before elections for "program[s]" to remove registrants. Unlike these provisions, the Failure-To-Vote Clause also covers an "activity"—"a specified pursuit in which a person partakes"—and reaches removals occurring outside systematic processes. *Am. Heritage Dictionary, supra*, at 17-18.

Result In. The clause's verb shows that the applicable program must "result in" a consequence. That text is a "phrasal verb"—"a verb plus a preposition (or particle)." *Chicago Manual of Style* § 5.102, at 174 (15th ed. 2003). This verb choice requires the state program to "bring about something" or "cause something to happen." *McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs* 560 (2005); *Chambers Dictionary of Phrasal Verbs* 304 (1996).

Removal. The clause's object identifies the consequence that the program must (not) cause—"the removal of the name of any person from the official list of voters registered to vote in an election for Federal office." 52 U.S.C. § 20507(b)(2). Removal, a buried verb used as an object, commonly means the "fact of being removed," and "remove," in turn, commonly means "to do away with," "get rid of," or "eliminate." *Am. Heritage Dictionary, supra*, at 1476; *New Oxford*

Am. Dictionary, *supra*, at 1441. This object thus shows that the clause regulates only one *specific* thing—the elimination of a person from the rolls.

By Reason Of. A prepositional phrase further limits the clause's scope to a subset of removals—those that are "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This phrase triggers the canon that "Congress legislates against the background of general common-law principles." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017). A general background principle and a specific one both illustrate that "by reason of" requires a proximate-causation connection between nonvoting and removal.

As a general matter, "[t]he law has long considered causation a hybrid concept, consisting of two constituent parts"—"actual" (or but-for) cause and "legal" (or proximate) cause. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014). And "[g]iven proximate cause's traditional role in causation analysis," the Court "has more than once found a proximate-cause requirement built into a statute that did not expressly impose one." *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9-10 (2010); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-35 (1983).

To be sure, the Court usually confronts causation questions when interpreting statutory causes of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). But it has applied proximate causation more generally. It has held, for example, that the National Environmental Policy Act should "be read to include a requirement

of a reasonably close causal relationship . . . like the familiar doctrine of proximate cause from tort law." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 696 n.9, 700 n.13 (1995) (indicating that the Endangered Species Act incorporated "proximate causation").

As a specific matter, the Court has already found a proximate-cause element in the "by reason of" phrase. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). *Holmes* addressed the cause of action in the Racketeer Influenced and Corrupt Organizations Act (RICO), which allows parties to sue for injuries arising "by reason of" RICO violations. 18 U.S.C. § 1964(c). The Court reasoned that courts had interpreted "by reason of" in antitrust laws to require proximate cause, and that Congress would have known of that reading when using the same phrase in RICO. *Holmes*, 503 U.S. at 267-68.

Other courts have read statutes passed near the time of the NVRA similarly. One found this "'by reason of' language" to have a "well-understood meaning" that "historically" requires "proximate cause." *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013). Another relied on the fact that "'by reason of' has been interpreted to incorporate a proximate cause requirement in several other federal statutes." *Breeden v. Novartis Pharm. Corp.*, 714 F. Supp. 2d 33, 36 (D.D.C. 2010), *aff'd* 646 F.3d 43 (D.C. Cir. 2011). In short, "'[t]he causal connection implied by the phrase "by reason of" is normally that of proximate causation.'" *Cruz-Mendez v. Isu/Ins. Servs.*, 722 A.2d 515, 525 (N.J. 1999) (citation omitted).

The Court's reading of "by reason of" here should be no different from its reading in *Holmes*. Congress "used the same words, and [the Court] can only assume it intended them to have the same meaning that courts had already given them." 503 U.S. at 268. Indeed, as detailed below, the Failure-To-Vote Clause can be reconciled with other NVRA provisions *only if* it contains a proximate-causation limitation.

2. A failure to respond to a notice under Ohio's Supplemental Process breaks any proximate-cause connection between nonvoting and removal

Proximate causation "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (internal quotation marks omitted). The concept depends on context. Courts thus "'look to the underlying policies or legislative intent'" for a particular statute "'in order to draw a manageable line between those causal changes that may make an [action] responsible for an effect and those that do not.'" *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted).

Here, two canons of construction show that Ohio's Supplemental Process does not make nonvoting a proximate cause of removal under the Failure-To-Vote Clause. *First*, the clause must be read harmoniously with the Confirmation Procedure. *Second*, the backdrop against which Congress passed the NVRA shows that it would not have impliedly barred States from sending notices to nonvoters.

a. The Failure-To-Vote Clause fits with the Confirmation Procedure because the failure to respond to a notice is the sole proximate cause of removal

The Court interprets laws so as to "'fit, if possible, all parts into a[] harmonious whole.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citation omitted). A specific clause must be read in light of the "larger statutory landscape." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). All provisions "should be interpreted in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

This canon applies here. The Failure-To-Vote Clause *prohibits* States from removing persons "by reason of" the failure to vote. The Confirmation Procedure *requires* States to rely on the failure to vote to remove registrants. 52 U.S.C. § 20507(d)(1)(B)(ii). Whenever a State uses the Confirmation Procedure, failure to vote will—by definition—be an actual cause of removal. Thus, the Court must read "by reason of" in such a way that the Confirmation Procedure's *required* use of nonvoting is not a proximate cause of removal *prohibited* by the Failure-To-Vote Clause. To do otherwise would "subvert the statutory plan" by treating the Failure-To-Vote Clause as prohibiting what the Confirmation Procedure was "designed to allow." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994).

A well-known test—one as old as the famed decision barring recovery for a patron who galloped "violently" away from a pub and crashed into a pole left in the road, *Butterfield v. Forrester*, 103 Eng. Rep.

926, 927 (K.B. 1809)—reconciles these provisions. That is because the Confirmation Procedure also requires registrants to "fail[] to respond" to a notice before they can be removed. 52 U.S.C. § 20507(d)(1)(B)(i). The notice must include a "postage prepaid" "pre-addressed return card." *Id.* § 20507(d)(2). Registrants need only confirm that they remain at the same address, and the notice warns that removal could occur if they do not. *Id.* § 20507(d)(2)(A). Because the Confirmation Procedure places this modest duty on registrants, the Failure-To-Vote Clause is best read as treating the failure to respond to this notice—not the earlier failure to vote—as the "*sole* proximate cause" of removal. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011) (departing from traditional proximate-cause test because of a statute's broad causation language).

Reconciling the provisions in this way comports with proximate cause in the contributory-negligence context. At common law, it was "generally accepted" that an action could not "be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the" plaintiff. *Grand T. R. Co. v. Ives*, 144 U.S. 408, 429 (1892); Thomas M. Cooley, *Law of Torts* 812-17 (2d ed. 1888); 57B Am. Jur. 2d Negligence § 881 (noting that if a plaintiff's "actions or omissions are unreasonable and contribute to the injury, then they are deemed by the law to be the proximate cause of the injury"). That principle survived, in modified form, the transition to comparative fault. *E.g.*, *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1314 (Mass. 1988). In admiralty, for example, a plaintiff that is "the *sole proximate cause* of its own injury" cannot recover "from tortfeasors or contracting partners

whose blameworthy actions or breaches were causes in fact of the plaintiff's injury." *Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996).

Furthermore, because the Failure-To-Vote Clause treats the failure to respond to a notice as the "sole proximate cause" of removal, *CSX*, 564 U.S. at 693, it does not bar States from relying on nonvoting to identify the registrants who are sent notices. The clause says nothing about who may receive notices under the Confirmation Procedure. Its text regulates removals, not notices. And any connection between the initial failure to vote that triggers a *notice* and the final *removal* is "'indirect'" and "'purely contingent'" on the registrant's failure to respond. *Hemi*, 559 U.S. at 9 (citation omitted).

Indeed, reading the Failure-To-Vote Clause to bar States from sending notices to nonvoters creates an "'[in]coherent regulatory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). The clause does not bar States from sending notices to the *entire electorate*, because that statewide canvass would not tie notices to nonvoting. But the canvass would be less reliable in identifying ineligible registrants than Ohio's process because it would use the failure to respond to the notice plus only the Confirmation Procedure's *four* years of nonvoting to conclude that a registrant had become ineligible. It would be odd to read the clause as allowing States to base removals on a failure to respond to a notice and *four* years of nonvoting, but barring States to base removals on a failure to respond to a notice and *six* years of nonvoting.

b. Congress would not have used hidden implications to restrict the States' authority over confirmation notices

The Court presumes that Congress does not conceal sweeping reform in between the lines of a regulatory scheme. *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Instead, it makes prominent changes in a "prominent manner." *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

This canon applies to the NVRA, given the backdrop against which Congress enacted it. By 1993, a majority of States had long used the failure to vote—in some fashion—to maintain their rolls. *See supra*, at 4 & nn.1-2. Most States sent notices to registrants when removing them. Many "provide[d] voters with a way to update or prevent removal from the registration list." H.R. Rep. No. 103-9, at 30. Only a minority removed voters solely for nonvoting without accounting for the failure to respond to a notice. *Id.*

In light of this tradition, any broad ban on sending notices to nonvoters would rise to the level of a "fundamental detail[]" that Congress would adopt with an express command, not a string of inferences. *Whitman*, 531 U.S. at 468. Yet what does the Confirmation Procedure say about the registrants who may be sent notices? Utter silence. This "statutory silence" is "[e]qually illuminating here," as the Court has found it elsewhere. *Tapia v. United States*, 564 U.S. 319, 330 (2011). Indeed, Congress's silence about *who* may receive such notices stands in sharp

contrast to its details about *what* notices must contain. 52 U.S.C. § 20507(d)(2). And the Safe-Harbor Provision makes the only specific reference to recipients, but it identifies an *option*, not a *command*. *Id.* § 20507(c)(1). Thus, the NVRA is best read as modestly making a few outlier States send notices, not drastically departing from a common state practice.

The NVRA's balanced purposes confirm that the Failure-To-Vote Clause would not *impliedly* restrict state authority over notices. By juggling the sometimes competing goals of increasing registration but decreasing ineligible registrants, 52 U.S.C. § 20501(b), the NVRA proves that laws are "the art of compromise," *Henson*, 137 S. Ct. at 1725. "[A]nd the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 540 (1983). This describes the NVRA's treatment of notices to a T. Its silence about the registrants who may receive them—in a statute with a "trail of detailed provisions," *id.* at 547—should not be deemed a delegation *to the federal courts* to adopt, in common-law fashion, the notice rules that they believe "best." After all, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Instead, the NVRA's silence should be deemed a delegation *to the States* to use their judgment on the issue—as they had done long before the NVRA.

The NVRA's legislative history also confirms this point. Committee reports noted that most "states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might

have moved)." S. Rep. No. 103-6, at 46. "Of these," the reports continued, "only a handful of states simply drop the nonvoters from the list without notice. These states could not continue this practice under the bill." *Id.* The next sentence added: "Whether states canvass all those on the list or just the nonvoters, most send a notice to assess whether the person has moved." *Id.*; H.R. Rep. No. 103-9, at 30 (same). These statements reiterate the statutory text, reflecting an intent to bar only non-notice programs. *Cf.* H.R. Rep. No. 103-9, at 30-31 (noting that the Act "suggests, but does not require," the Safe-Harbor Provision's process, and that States could "choose their *current* or other method for list cleaning (as long as it is uniform, nondiscriminatory, and does not drop for nonvoting)" (emphasis added)).

Indeed, one State suggested the NVRA's ultimate compromise. When criticizing those that automatically removed nonvoters, Florida's Secretary of State praised his State's own procedures—sending a notice to registrants who had not voted for two years, and removing them if they failed to respond and to vote for several more years. *Voter Registration: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 103d Cong. 173 (Jan. 26, 1993) (Statement of Jim Smith, Fla. Sec'y of State).

B. The Sixth Circuit's Reading Conflicts With The Failure-To-Vote Clause And The NVRA As A Whole

To invalidate Ohio's Supplemental Process, the Sixth Circuit made three mistakes: (1) it read the Failure-To-Vote Clause as barring all programs that make nonvoting a *but-for cause*—not a *proximate cause*—of removal; (2) it read the clause to regulate

the *notices* that States send to registrants rather than the *removal* of registrants; and (3) it misread the relationship between the *Failure-To-Vote Clause* and *the Confirmation Procedure*.

1. *But-For v. Proximate Causation*. Discussing one word in the Failure-To-Vote Clause, the Sixth Circuit noted that "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. 21a (quoting *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002)). The court held that Ohio's Supplemental Process violates the clause because it uses nonvoting "as the 'trigger' for sending a confirmation notice," so "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.* (citation omitted). This but-for test conflicts with the Failure-To-Vote Clause's text and with the NVRA as a whole.

Start with the Failure-To-Vote Clause's text. The Sixth Circuit misread the clause in two ways, allowing it to ignore the sentence's key phrase. For starters, the court picked the wrong definition of "result." It mistakenly chose a definition of result (to arise as a consequence) that makes the sentence's subject the *effect* (removal) of a causal agent. But the Failure-To-Vote Clause invokes a different definition of result (to cause) in which the sentence's subject is the *causal agent* itself (program or activity). Next, the court changed the clause's subject. It said that removal (the effect) must not arise as a consequence of the failure to vote (i.e., that the *failure to vote* must not "result in" removal). Pet. App. 21a. Yet the Failure-To-Vote Clause actually states that it is the *program or activity* that must not "result in" remov-

al. The connection between failure to vote and removal springs from the phrase "by reason of." All told, the court rewrote the clause to say: "A person's removal shall not result from the failure to vote." It thus excised the phrase "by reason of," and this improper omission allowed it to avoid the cases holding that this phrase incorporates proximate cause. *E.g.*, *Holmes*, 503 U.S. at 268.

Turn to the NVRA as a whole. The Sixth Circuit's test conflicts with the NVRA's Confirmation Procedure and Safe-Harbor Provision. Both bar States from removing registrants unless they fail to vote for two elections. Removal under these processes *always* "arises as a consequence" of nonvoting. The Sixth Circuit thus read the Failure-To-Vote Clause to *prohibit* what those processes *require*. That "subvert[s] the statutory plan." *ACF Indus.*, 510 U.S. at 340.

2. *Notice v. Removal.* The Sixth Circuit recognized that the Confirmation Procedure "involves consideration of a registrant's failure to vote." Pet. App. 15a. To reconcile its broad causation test with that procedure, the court shifted the Failure-To-Vote Clause's focus from asking whether a program *removes* registrants for nonvoting to whether it *sends notices* to registrants for nonvoting. Under the Supplemental Process, the court reasoned, "the confirmation notice procedure is 'triggered' by" nonvoting. Pet. App. 15a. So the court asked "whether that trigger provision should be analyzed *separately* from the confirmation notice procedure, such that the *trigger* is subject to the [Failure-To-Vote Clause]" independently of the notice. *Id.* (emphases added). Answering "yes" to that question, the court held that the Supplemental Process violated the clause be-

cause it uses nonvoting "as the 'trigger' for sending a confirmation notice." Pet. App. 21a.

That holding rewrote the Failure-To-Vote Clause in a different way. The clause says nothing about "sending a confirmation notice" to voters for failing to vote. Pet. App. 21a. It also says nothing about what can "trigger" the Confirmation Procedure. Pet. App. 15a. Instead, the clause regulates one specific object—the "removal" from the rolls. *Removing* individuals differs from *sending notices* to them. In addition, the clause identifies a "program or activity" as its subject, which directs courts to consider whether the *entire* "program" removes individuals for nonvoting. Courts should not "separately" divide a program into its component parts, and "subject" each part to a discrete ban on any use of nonvoting. *Id.*

The Sixth Circuit interpreted the Failure-To-Vote Clause as "separately" applying to a notice's "trigger" in order to reconcile the court's broad understanding of that clause with the Confirmation Procedure. *Id.* Yet the text simply does not permit its proposed reconciliation. And the Sixth Circuit's "need to rewrite clear provisions of the statute should have alerted [the court] that it had taken a wrong interpretive turn" with its expansive causation test. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Courts, like agencies, cannot adopt "'unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'" *Id.* (citation omitted).

3. *Failure-To-Vote Clause v. Confirmation Procedure.* The Sixth Circuit suggested that its reading was necessary so as not to render the Failure-To-Vote Clause "surplusage." Pet. App. 17a-18a. That

is so, the court said, because § 20507(d)(1)—the provision introducing the Confirmation Procedure—already bars States from removing registrants "unless" they follow that procedure. Pet. App. 18a. If the Failure-To-Vote Clause applied to a notice's "trigger," the court reasoned, it would contain a limitation distinct from the one found in § 20507(d)(1). *Id.* Yet the court's atextual reading of the clause was unnecessary to give it independent force. Under the clause's plain text, a "meaningful difference" already exists between these two provisions. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1588 (2016); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (rejecting superfluity argument despite "overlap" because the Court's reading did not render any provision "wholly superfluous").

To begin with, § 20507(d)(1) sets limits for *one type* of removal; the Failure-To-Vote Clause sets limits for *any type* of removal. Section 20507(d)(1) requires States to follow the Confirmation Procedure if they are removing registrants on the ground of "*changed residence*." 52 U.S.C. § 20507(d)(1) (emphasis added). Section 20507(d)(1) thus provides no limit whatsoever on removing registrants for *failure to vote*. The Failure-To-Vote Clause, of course, does so. It directly bars removal for nonvoting (whether or not a person has become ineligible for another reason), and indirectly bars States from using nonvoting as the sole proxy for concluding that a person has become ineligible for *any other reason*.

To be sure, another provision—§ 20507(a)(3)—limits the States' ability to remove "registrants" other than for specified reasons: "at the registrant's request"; "as provided by State law, by reason of crimi-

nal conviction or mental incapacity"; as a result of the registrant's "death" or as a result of "a change in the residence." 52 U.S.C. § 20507(a)(3)-(4). Even if this subsection identified the *exclusive* reasons that States could remove individuals from the rolls, the Failure-To-Vote Clause reaches further than § 20507(d)(1). Without that clause, States could rely on failure to vote—without notice—to conclude that voters had become ineligible for reasons other than changed residence (e.g., because they had died).

There is also good reason not to read § 20507(a)(3) as containing the *exclusive* justifications for removal. It does not identify all qualifications for voting. States generally limit voting to citizens who are 18 or older. Ohio Const. art. V, § 1; Elections Assistance Comm'n, *Nat'l Mail Voter Registration Form*, https://www.eac.gov/assets/1/6/Federal_Voter_Registration_6-25-14_ENG.pdf. For reasons explained below, Part III.A, this subsection would be unconstitutional if it barred States from removing "minors, fictitious individuals, individuals who in fact misrepresent their residence in the state, and non-citizens." *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1282 (S.D. Fla. 2012), *rev'd on other grounds by Arcia v. Fla. Sec'y of State*, 746 F.3d 1273 (11th Cir. 2014). The Court need not read it that way. Applying to "registrants," it can be interpreted to cover only those who were lawfully included on the rolls *at the time* they registered. *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004); *cf. Webster's New World Dictionary of the Am. Language* 1196 (2d coll. ed. 1986) (defining "registrant" as "a person who registers," and "register" as "to have one's name placed on the list of those eligible to vote in an election, by making application *in the prescribed way*" (emphasis added)).

The Failure-To-Vote Clause, by contrast, governs the removal of "any person." 52 U.S.C. § 20507(b)(2). It thus extends more broadly than § 20507(a)(3)'s regulations for "registrants." "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Unlike § 20507(d)(1), the Failure-To-Vote Clause applies even to state programs or activities designed to uncover persons who were wrongly added to the rolls as an initial matter. *Cf.* Ohio Rev. Code § 3503.15(H) (program for identifying noncitizen registrants).

II. HAVA Confirms That The NVRA Permits Ohio's Supplemental Process

Even if the NVRA was originally ambiguous as to whether the Failure-To-Vote Clause permitted States to send notices to nonvoters, HAVA removed all doubt that they may. It clarified that the Failure-To-Vote Clause barred States only from removing voters "solely" for nonvoting, and did not affect programs otherwise incorporating the Confirmation Procedure. To reach a contrary result, the Sixth Circuit departed from HAVA's text and read its amendments to serve an implausible purpose.

A. HAVA Clarified That States May Send Notices To Nonvoters Under The Confirmation Procedure

When "'Congress acts to amend a statute,'" this Court "'presume[s] it intends its amendment to have real and substantial effect.'" *Husky*, 136 S. Ct. at 1586 (citation omitted). That is, the Court refuses to read amendments in a way that renders them "a

largely meaningless exercise." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Indeed, "*statutory* history" (as compared with legislative history) "form[s] part of the context of the statute" as it exists today. Scalia & Garner, *supra*, at 256; *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014).

This principle supports Ohio's Supplemental Process. In the 1990s, the DOJ argued that the Failure-To-Vote Clause barred programs sending notices to nonvoters. It took this position in letters to Alaska, Georgia, and South Dakota, and suits against California and Pennsylvania. U.S. Br., 6th Cir. App. R.29, at PageID#6-7 & Attachs. 1-6, PageID#65-172. Some States proposed using this process despite the DOJ's arguments, and federal guidance noted that the issue "remain[ed] a question of the legal interpretation of NVRA provisions." FEC, *Report to State and Local Election Officials*, *supra*, at 5-22 & n.13.

HAVA then clarified the Failure-To-Vote Clause. Two amendments show that Congress sided with *the States* in this debate. After HAVA, the DOJ even entered into an agreement with Philadelphia that *required* the city to use a process like Ohio's. U.S. Br., 6th Cir. App. R.29, Attach. 11, PageID#258-59.

1. *Clarifying Amendment.* HAVA amended the Failure-To-Vote Clause by inserting a rule of construction: "except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual" has not responded to a notice and has not voted in two federal elections. 52 U.S.C. § 20507(b)(2). In the section's title, HAVA referred to

this change as a "clarification." 116 Stat. at 1728; *cf.* H.R. Rep. No. 107-730, at 81 (2002) (noting that this amendment "clarif[ied] the ability of election officials to remove from the voter registration list the name of an individual who has not responded to a notice from the registrar of voters and who has not voted in two or more consecutive general elections for Federal office").

This amendment's text and purpose confirm the legality of Ohio's process. The text states that "nothing in this paragraph" can be "construed" to "prohibit a State" from removing an individual under "the procedures described" in § 20507(c) and (d) if the individual fails to respond to a notice and to vote for two elections. 52 U.S.C. § 20507(b)(2). This language shows that the Failure-To-Vote Clause does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure. That is, it confirms that the failure to respond to a notice breaks any causal link between nonvoting and removal. If, by contrast, the Court were to read the Failure-To-Vote Clause to bar States from removing individuals under § 20507(d) because those individuals were sent notices for nonvoting, the court *would be* construing the clause, in some circumstances, "to prohibit a State from using the procedure[] described in" § 20507(d).

The Clarifying Amendment also must permit programs like Ohio's because of the "lack of any other plausible purpose." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163 (2004). Before the amendment, the DOJ debated with States *specifically* about whether they could send notices to nonvoters. The FEC even told Congress that a State sug-

gested "clarifying the NVRA provisions to permit the use of failure to vote . . . as a trigger to generate fewer confirmation mailings." FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1997-1998, A Report to the 106th Congress*, at 19 (June 30, 1999); FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1999-2000, A Report to the 107th Congress*, at 26 (June 30, 2001) (noting that a State recommended "allowing confirmation notices to be sent based on the combination of not voting and no contact"). Thus, even if the Failure-To-Vote Clause might have been considered to bar States from sending notices to nonvoters before HAVA, the Clarifying Amendment "served the purpose of correcting the error" in interpretation by "clarifying" the clause's "original meaning." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988).

2. *Statewide List Requirements.* Another HAVA section supports this view. HAVA compelled States to keep statewide registration lists. 52 U.S.C. § 21083(a)(1)(A). A subsection required States to adopt "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* § 21083(a)(4)(A). The next sentence added two clarifications about "how 'such system'" must operate. *Colón-Marrero v. Vélez*, 813 F.3d 1, 11 (1st Cir. 2016). Unlike the NVRA (which *permitted* States to remove voters who failed to respond to a notice and vote over two elections), the sentence's first part *commanded* States to remove voters "who have not responded to a notice and who have not voted in 2 consecutive general elections." 52 U.S.C.

§ 21083(a)(4)(A). The second part clarified: "except that no registrant may be removed *solely* by reason of a failure to vote." *Id.* (emphasis added).

These amendments further validate Ohio's process. To begin with, HAVA's command to remove all registrants who fail to respond to a notice and to vote in two elections shows that Ohio *must* remove registrants who meet these requirements and who are sent notices under the Supplemental Process. *Id.* If Ohio did not do so, it would violate § 21083(a)(4)(A)'s clear statutory mandate.

In addition, HAVA's use of the word "solely" clarifies the Failure-To-Vote Clause's narrow reach. When a State removes a registrant *both* because the registrant has failed to respond to a notice *and* because the registrant has failed to vote, the State has not removed the registrant *solely* because the registrant has failed to vote. *Colón-Marrero*, 813 F.3d at 11 (reading "solely" as confirming "the need for both notice and a voting gap"). One dictionary defines "solely" to mean "[a]lone" or "singly," listing "solely responsible" as an example. *Am. Heritage Dictionary*, *supra*, at 1654. A second defines the adverb to mean "without another" or "to the exclusion of all else." *Merriam-Webster's Collegiate Dictionary* 1187 (11th ed. 2003). Under ordinary English, a person's failure to vote is not "solely responsible" for removal "to the exclusion of all else" if that removal *also* arises because the person fails to respond to a notice.

B. The Sixth Circuit's Decision Obviated HAVA's Text And Purpose

The Sixth Circuit's interpretation of HAVA cannot stand.

1. *Clarifying Amendment.* The Sixth Circuit read HAVA's amendment to the Failure-To-Vote Clause as accomplishing the exact opposite of what it accomplished. According to the court, the amendment clarified that "any part of a state's roll maintenance process that does not mimic the expressly permitted procedures outlined in subsections (c) or (d)—in this case, the Supplemental Process' two-year 'trigger' provision—is *subject to*" the Failure-To-Vote Clause. Pet. App. 20a (emphasis added). This flips the amendment on its head.

a. The Sixth Circuit's interpretation conflicts with the amendment's text and purpose. The text directs courts not to "construe[]" the Failure-To-Vote Clause as barring States from removing voters under § 20507(d). 52 U.S.C. § 20507(b)(2). It is a rule of construction *limiting* the clause's scope. Yet the Sixth Circuit read the amendment as *broadening* that scope. Under the court's logic, the amendment expanded the Failure-To-Vote Clause from a narrow ban on using nonvoting for *removal* to a broad ban on using nonvoting in "*any part*" of a program. Pet. App. 20a (emphasis added). If, however, Congress meant to expand the Failure-To-Vote Clause beyond "removal," it would not have phrased the amendment as a limiting rule of construction to guard against overbroad interpretations of the clause.

The Sixth Circuit also interpreted the amendment to serve the most "[im]plausible" of purposes. *Cf. Empagran*, 542 U.S. at 163. According to the court, Congress felt the need to clarify that the NVRA's Failure-To-Vote Clause did not outlaw the NVRA's Confirmation Procedure. Pet. App. 15a. That makes little sense. The Sixth Circuit identified

no pre-HAVA authority—whether DOJ guidance, case law, or arguments from litigants—that advocated reading the NVRA paradoxically to prohibit what it permits. Nor would such a reading have comported with the bedrock principle to "'read statutes as a whole.'" *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). Thus, such an alleged clarification can only be characterized as a "meaningless exercise." *Rumsfeld*, 547 U.S. at 58. In short, the Sixth Circuit "acted as though the amendment . . . had not taken place." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016).

b. The Sixth Circuit bolstered its reading of the Clarifying Amendment with the alleged canon that courts construe "exceptions to a statute's general rules" narrowly. Pet. App. 16a. For three reasons, the Court should reject this canon here.

First, the Sixth Circuit wrongly treated the Clarifying Amendment "as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). But the amendment "has a different ring to it." *Id.* HAVA did not add an *exception* to the Failure-To-Vote Clause's ban; it added an *explanation* of that ban. It clarified that "nothing in this paragraph may be *construed*"—the key word—"to prohibit a State from" removing voters under the Confirmation Procedure. 52 U.S.C. § 20507(b)(2) (emphasis added). It thus instructs courts to adopt a construction of the clause that *permits* the Confirmation Procedure. The Sixth Circuit cited no case applying its chosen canon to such clarifications. The canon applies only when a statute sets a general rule

(such as a ban on disclosing personal information) and lists exceptions that would otherwise violate the rule (such as situations when disclosure is allowed). *Maracich v. Spears*, 133 S. Ct. 2191, 2195, 2200 (2013). Here, the amendment clarifies that the general rule does not reach specified conduct in the first instance.

Second, this canon applies *only* when a statute's general rule (like the Freedom of Information Act's disclosure requirement) furthers its central purpose, while an exception cuts against that purpose. *Milner v. Dep't of Navy*, 562 U.S. 562, 571-72 (2011). As the Sixth Circuit conceded, the NVRA and HAVA serve *dueling* purposes—to increase the rolls but also remove ineligible voters. Pet. App. 10a. To put a thumb on the scale in favor of a provision serving one purpose (expanding registration) at the expense of a provision serving the other (eliminating ineligible voters) upends Congress's compromise.

Third, the Sixth Circuit's extravagant use of this canon shows that it has reached its expiration date. The canon is the flipside of another that the Court has called the "last redoubt of losing causes": the notion that a remedial law "should be liberally construed to achieve its purposes." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995). Both canons stem from "inappropriate judicial antagonism to limitations on favored legislation." Scalia & Garner, *supra*, at 363; *id.* at 364-66. "Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation." *Id.* at 363; *see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014).

The manner in which this canon arose confirms that it should be retired. It took on prominence with, and shares the defects of, the now-entombed practice of implying private rights of action. *Compare Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), *with J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). The same can be said for reading exceptions narrowly to further what courts believe to be good policy. Courts should not liberally construe remedies or strictly construe exceptions—"no matter how desirable that might be as a policy matter." *Id.* And having "sworn off the habit of venturing beyond Congress's intent" in the cause-of-action context, the Court should reject the Sixth Circuit's attempt "to have one last drink" in the exceptions context. *Id.*

Indeed, the Court has *already* rejected this canon in logic, if not in name. It now recognizes that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). So it is wrong "simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. Instead, "[f]inding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone)." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) (citation and quotation marks omitted). The canon that exceptions are strictly construed cannot coexist with this principle because it rests on the assumption the

principle rejects—that a strict reading of an exception always furthers a statute's purpose.

2. *Statewide List Requirements.* The Sixth Circuit conceded that the Failure-To-Vote Clause "appear[ed] to have been given a more narrow interpretation by" HAVA's section barring removal "solely by reason of a failure to vote." Pet. App. 21a-22a. But the court found this "solely" element satisfied because "operation of the Supplemental Process' trigger is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a. This rewrites the text. The text does not say no registrant may be *sent a notice* solely by reason of a failure to vote; it says "no registrant may be *removed* solely by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). Ohio's Supplemental Process *removes* voters only if they both fail to vote *and* fail to respond to a notice. "Had Congress wanted, as the [Sixth Circuit] contend[ed]," to bar the sending of notices to nonvoters, "it had an easy way to do so—differing by only [a few] words from the language it chose, but with an altogether different meaning." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). This Court must follow the statute that Congress wrote, not the one that the Sixth Circuit did.

The Sixth Circuit responded that reading "solely" to mean "solely" "would render the [Failure-To-Vote Clause] entirely superfluous because [§ 20507](d)(1) already requires states to use the confirmation notice procedure." Pet. App. 23a. That is wrong for the reasons explained. *Supra* Part I.B.3. To fix an imagined superfluity problem, moreover, the Sixth Circuit created a real one: It gave "solely" no meaning whatsoever. The court thus fell into an all-too-common

trap. "Sometimes lawyers will seek to have a crucially important word ignored—such as *only*, *solely*, or *exclusively*—and nontextualist judges will often oblige them." Scalia & Garner, *supra*, at 174. This Court should avoid the same mistake.

That said, the Sixth Circuit correctly ignored one argument about this "solely" clause that focused on how it begins—with "except that." 52 U.S.C. § 21083(a)(4)(A). That argument has major and minor premises. As its major premise, the argument asserts that the "except that" text shows that the clause contains an *exception* to the preceding clause requiring States to remove voters who fail to respond to a notice and vote over four years. As its minor premise, the argument asserts that a situation must exist in which someone who has failed to respond to a notice and to vote for four years has been removed "solely" for nonvoting; otherwise, the clause serves no purpose. This argument lacks merit because its major premise—that the solely clause is an exception to the preceding clause—is flawed. Together, both clauses are naturally read as restraining the "system of file maintenance" that the subsection requires. *Id.* That "system" *must* remove voters who fail to respond to a notice and fail to vote over four years, but *cannot* remove voters solely for nonvoting. *See Colón-Marrero*, 813 F.3d at 11. It is common for the item that a proviso clause restrains to be "found not immediately before but several clauses earlier." Scalia & Garner, *supra*, at 154. And that reading best respects the plain meaning of "solely."

III. Substantive Canons Of Construction Confirm That The NVRA Permits Ohio's Supplemental Process

Even if ambiguity remained after HAVA, two canons would clarify it in favor of Ohio. The canon of constitutional avoidance applies because reading the NVRA to bar Ohio's process heightens constitutional concerns with this statute. The clear-statement rule also directs the Court to resolve ambiguity in a way that protects state authority.

A. The Canon Of Constitutional Avoidance Applies To The NVRA

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). If one reading "give[s] rise to serious constitutional questions," the Court picks a reading that lessens those concerns. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). The Court applies this canon even when one reading allows it only to delay review of, but not eliminate, constitutional issues. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009). The canon applies here because an expansive reading of the Failure-To-Vote Clause would exacerbate constitutional concerns with the NVRA.

1. The Constitution demarcates a hazy boundary between two constitutional powers. The Elections Clause gives Congress the power to "make or alter" regulations governing the "Times, Places and Manner of holding Elections" for Congress. U.S. Const. art. I, § 4, cl. 1. This clause sets a "default" rule that "invests the States with responsibility for the me-

chanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). The Court has suggested that the clause grants "'broad power' to prescribe the *procedural mechanisms* for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (emphasis added).

Yet the Elections Clause leaves the power to set *voting qualifications* for federal elections with the States. A State's qualifications for congressional elections need only be the same as its qualifications in elections for "the most numerous Branch of the State Legislature." U.S. Const., art. I, § 2, cl. 1; *id.* amend. XVII. The Constitution grants even more state authority over presidential elections, permitting a State to "appoint, in such Manner as the Legislature thereof may direct," presidential electors. U.S. Const. art. II, § 1, cl. 2. "Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Inter Tribal*, 133 S. Ct. at 2258 (citation omitted). (Elsewhere, of course, the Constitution prohibits voting discrimination, but those amendments are not at issue here. U.S. Const. amend. XV, XIX, XXIV, XXVI; *Inter Tribal*, 133 S. Ct. at 2256 (referring to NVRA as "Elections Clause legislation").)

Some laws will fall distinctly into the "qualifications" camp reserved to States or the "Times, Places, and Manner" camp shared with Congress. As noted, States require voters to be citizens. Ohio Const. art. V, § 1. Such a limit counts as a "qualification" under any definition. *Inter Tribal*, 133 S. Ct. at 2252. Congress, by contrast, has long limited the *times* for

holding congressional elections to one Election Day. 2 U.S.C. §§ 1, 7; *Foster*, 522 U.S. at 68-69. And it has long required States to hold elections for representatives using single-member districts. *Vieth v. Jubelirer*, 541 U.S. 267, 276-77 (2004) (plurality op.).

Given the overlap between these powers, however, laws falling in between the extremes will not be as easy to categorize. On one hand, the States' power obviously allows them to set requirements "that enable[] or empower[] a person to do that which otherwise he could not"—i.e., vote. Thomas Dyche & William Pardon, *A New General English Dictionary* (13th ed. 1768) (defining "qualification"); *cf.* 1 Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773). Yet this power to *prescribe* qualifications would be meaningless if it did not include a derivative power to *enforce* them. *Inter Tribal*, 133 S. Ct. at 2258-59. The power necessarily extends further: "In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 430, at 412-13 (1833); Scalia & Garner, *supra*, at 192-93.

On the other hand, Congress's power over the "manner of holding elections" speaks of the "mode" or "method" of *conducting elections*, not of *resolving who has proper qualifications*. Dyche & Pardon, *supra* (defining "manner"); Johnson, *supra* (same). A precise reading of *manner* "give[s] effect" to the clause's other words (*times* and *places*), which would be superfluous if manner had a broad scope. *Cf. Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) (*ejusdem generis*). That reading also comports with the founders' examples of "manner" regulations, such

as "[w]hether the electors should vote by ballot or vivâ voce." 2 *The Records of the Federal Convention of 1787*, at 240 (M. Farrand ed., 1911) (James Madison). And it comports with the Elections Clause's narrow purpose—to ensure that "the existence of the Union" was not left to the States, which could otherwise refuse to hold elections. *The Federalist* No. 59, at 361 (Alexander Hamilton) (C. Rossiter ed., 2003).

In sum, even Alexander Hamilton recognized that the States have a "broad power to set qualifications," and Congress has only "limited authority under the Elections Clause." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995).

2. Under this dichotomy, as President Bush noted when vetoing an earlier version of the law, the NVRA raises "serious constitutional question[s]." 138 Cong. Rec. 17,965-66 (1992). Here, the Sixth Circuit's reading of the Failure-To-Vote Clause implicates three such questions.

First, Ohio's Supplemental Process at least *enforces* its power to prescribe a residency qualification by requiring registrants to confirm their eligibility. If the Court reads the Failure-To-Vote Clause as barring this enforcement practice, it would exacerbate a serious constitutional question: How far may Congress restrict state power to *enforce* qualifications when regulating the *manner* of holding elections?

Inter Tribal interpreted the NVRA to avoid that question. There, Arizona sought to compel registration applicants to present proof of citizenship with the federal form that the NVRA required States to "accept and use" for registration. 133 S. Ct. at 2251-52. The Court held that the NVRA did not permit

States to require anything other than that form. *Id.* at 2254-56. But it read the NVRA as allowing Arizona to ask the Election Assistance Commission to alter the form to include its enforcement method, and seek judicial review of any refusal. *Id.* at 2259-60. The NVRA thus gave Arizona an "alternative means" of seeking to use its preferred method (and to assert its constitutional authority). *Id.* at 2259-60 & n.10.

Here, the NVRA provides no similar "alternative means" for Ohio to pursue its Supplemental Process. Thus, the only way to avoid the constitutional question is to read the Failure-To-Vote Clause as permitting that process. And *Inter Tribal* already found that a law that "precluded a State from obtaining information necessary to enforce its voter qualifications" "would raise serious constitutional doubts." *Id.* at 2258-59. If anything, this case raises greater concerns. Unlike Arizona's law, which required *documentary* proof, Ohio merely requires registrants to *confirm* their eligibility (on penalty of election falsification). Notice, R.38-19, PageID#1365.

The Court should not read the NVRA to mandate such aggressive encroachment on the States' power. While registration did not exist at the founding, States have always enforced qualifications by requiring voters to confirm their eligibility. Before ratification, poll officials would decide "whether individual electors were properly qualified." Robert J. Dinkin, *Voting in Provincial America* 132 (1977). A New York law, for example, directed inspectors to give oaths to potentially unqualified electors. 1787 N.Y. Laws 371, 374-75. After ratification, officials continued to give oaths to, and question, such electors. 1839 N.Y. Laws 363, 364; 1819 Ill. Laws 90, 93; *cf.*

Lincoln v. Hapgood, 11 Mass. 350, 353 (1814). In short, States required electors "to furnish such proof as [the States] deem[ed] requisite." *State ex rel. Cothren v. Lean*, 9 Wis. 279, 284 (1859).

Conversely, Congress has not traditionally exercised Elections Clause authority in a way that limited the States' enforcement power. *Cf. Printz v. United States*, 521 U.S. 898, 905-18 (1997). The founders recognized the "power over the manner of elections did not include that of saying who shall vote." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 71 (J. Elliot ed., 2d ed. 1836) (Steele statement at North Carolina ratifying convention). It was not until 1842 that Congress exercised Elections Clause power. *Gradwell*, 243 U.S. at 482. And while laws in the late 1800s allowed federal officials to monitor the polls and police violence and fraud, these laws *enhanced* enforcement; they did not *proscribe* it. *Ex parte Siebold*, 100 U.S. 371, 388 (1879) (noting that "Congress [did] not deem[] it necessary to interfere with the duties of the ordinary officers of election, but [was] content to leave them as prescribed by State laws"). The Sixth Circuit's reading thus "den[ies] the States their historic freedom to govern their own electoral processes" in a novel manner. 138 Cong. Rec. at 17,966.

Second, the Failure-To-Vote Clause might violate the States' qualifications power in a more fundamental way. Requirements that individuals register—including requirements that nonvoters register anew—might set "qualifications" within the meaning of the federal Constitution. Such provisions would then fall within the core, not the periphery, of the

States' qualifications power. While this Court has suggested, in dicta, that the Elections Clause grants power over "registration," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), it expressly reserved that question in *Inter Tribal*, 133 S. Ct. at 2259 n.9.

This issue, too, raises a serious question. The Court has offered little guidance on what counts as a "qualification" under the *federal* Constitution. When registration laws first arose, by comparison, state courts debated whether they were qualifications under *state* constitutions. *Morris*, 25 N.E. at 223-24; *cf. District of Columbia v. Heller*, 554 U.S. 570, 600-01 (2008). An early case upholding these laws considered them akin to procedural regulations governing "whether the votes shall be given personally or by proxy, *viva voce* or by ballot." *Capen v. Foster*, 29 Mass. 485, 490 (1832). Others reasoned that, while "voting *viva voce* or by ballot is a pure rule of procedure," a registration law set "a condition precedent to the right itself, and therefore a rule o[f] substantive law." *White v. Cty. Comm'rs Multnomah Cty.*, 10 P. 484, 486 (Or. 1886); *Dells v. Kennedy*, 49 Wis. 555, 558-60 (1880). This debate extended to laws removing nonvoters. *Compare Duprey v. Anderson*, 518 P.2d 807, 808-09 (Colo. 1974); *Simms v. Cty. Ct. of Kanawha Cty.*, 61 S.E.2d 849, 852 (W. Va. 1950), *with Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 229 (Md. 2003); *Mich. State UAW Cmty. Action Program Council v. Sec'y of State*, 198 N.W.2d 385, 387 (Mich. 1972).

Ultimately, many States amended their state constitutions to allow for registration, which removed constitutional concerns on *that* question. Yet those amendments, if anything, increased the concerns on

this one. As one court noted, "whatever may be the true rule where the Constitution is silent, we think there can be no doubt that under the Constitution of this State, registration under a proper law constitutes a qualification." *Morris*, 25 N.E. at 224. Today, many States identify registration requirements as constitutional commands. In Ohio, only individuals who have "been registered to vote for thirty days" have "the qualifications of an elector." Ohio Const. art. V, § 1; *see, e.g.*, Ark. Const. art. III, § 1; *id.* amend. 39; Del. Const. art. V, § 2; Fla. Const. art. VI, § 2; Or. Const. art. II, § 2(c); S.D. Const. art. VII, § 2.

Third, the NVRA governs the manner in which States conduct *presidential* elections. 52 U.S.C. § 20502(1)-(2). Yet Article II grants Congress only the authority to "determine the Time of chusing [those] Electors, and the Day on which they shall give their Votes." U.S. Const. art. II, § 1, cl. 4. And while *Burroughs v. United States*, 290 U.S. 534 (1934), said that Congress can regulate some aspects of these elections, the law there did *not* "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Id.* at 544. The NVRA thus raises another constitutional issue by "purport[ing] to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever." *Inter Tribal*, 133 S. Ct. at 2268 n.2 (Thomas, J., dissenting).

At day's end, the Court need not resolve these issues now. It may *avoid* them by reading the Failure-To-Vote Clause to permit Ohio's process—so long as that reading is "fairly possible." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). It is more than a *possible* reading. It is the *better* one.

B. The Clear-Statement Rule Supports The Validity Of Ohio's Supplemental Process

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Court has thus recognized several "background principles" of interpretation that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). The Court, for example, requires Congress to abrogate the States' sovereign immunity unambiguously, and it often starts with a presumption against preemption when interpreting federal laws. *Id.* at 2088-89. "Closely related" to these principles is a clear-statement rule that requires the Court to resolve ambiguities in favor of the States when federal legislation affects the federal-state balance. *Id.* at 2089. This clear-statement rule, too, resolves any remaining ambiguity in favor of Ohio's Supplemental Process.

To be sure, *Inter Tribal* stated that the "presumption against pre-emption" does not apply to federal laws passed under the Elections Clause. 133 S. Ct. at 2256. That holding followed from the Court's rule that the presumption against preemption does not apply to *express* preemption provisions, *e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), because laws under the Elections Clause always preempt some aspect of the State's preexisting regime, *Inter Tribal*, 133 S. Ct. at 2256. Thus, the Court refused to protect state interests by choosing a *plausible* reading of federal laws at the expense of the "*fairest* reading," after considering all of the

tools of statutory interpretation. *Id.* (emphasis added). Yet *Inter Tribal* should not be read broadly to eliminate any room for federalism whatsoever.

To the contrary, the Court should adopt a narrower view of the case. If, *after* exhausting traditional interpretive tools, a reading in favor of state authority is just as plausible as a reading against it, the clear-statement rule points to the former reading "to resolve [that] ambiguity." *Bond*, 134 S. Ct. at 2090. That reconciles *Inter Tribal* with the Court's broader principles. One of its first Elections Clause cases noted that the Court was "*bound to presume* that Congress," in using its Elections Clause power, had "done so in a *judicious* manner" that "guard[ed] as far as possible against any *unnecessary interference* with State laws and regulations." *Siebold*, 100 U.S. at 393 (emphases added). That is the very "'presupposition[]'" on which the clear-statement rule is based—that Congress does not cavalierly disrupt state operations. *Bond*, 134 S. Ct. at 2088 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Indeed, the Court has relied on a version of this clear-statement rule when interpreting the Elections Clause *itself*. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673-74 (2015). It "is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Id.* at 2673. Thus, the Court read the word "Legislature" in the Elections Clause expansively—allowing election regulations to be passed not just by a State's legislative body but also by its citizens through an initiative. *Id.* at 2673-74. If federalism concerns are broad enough to reach the

Court's interpretation of the Elections Clause, they are broad enough to reach the Court's interpretation of federal legislation passed under it.

The States, moreover, have traditionally taken the lead role in conducting elections. *Gradwell*, 243 U.S. at 483-85. "The separate States have a continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials." *Inter Tribal*, 133 S. Ct. at 2261 (Kennedy, J., concurring in part and concurring in the judgment). And given the practical impossibility today of operating separate state and federal election regimes, federal legislation for congressional elections inevitably affects state and local elections as well. *Id.* at 2272 (Alito, J., dissenting). This case proves the point. The Failure-To-Vote Clause has effectively prevented Ohio from enforcing its constitutional provision requiring removal for nonvoting in all of its elections. Ohio Const. art. V, § 1.

Finally, elections prove that States are "'laboratories for devising solutions to difficult legal problems.'" *Ariz. State Legislature*, 135 S. Ct. at 2673 (citation omitted). It is "far from clear" which of the combinations of programs for maintaining the rolls best balances accuracy against cost. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Infinite tradeoffs exist. To save money, States might rely solely on the Safe-Harbor Provision and change-of-address data. *Cf.* N.J. Stat. Ann. § 19:31-15. But that could miss many ineligible registrants. In 2006, a study found that "40 percent" of "undeliverable as addressed" mail was caused by "customers [who did] not notify the Postal Service of address changes." U.S. Postal Serv., Office of the Inspector

Gen., *Strategies for Reducing Undeliverable as Addressed Mail* 1 (2015), R.38-6, PageID#381.

To remedy that problem, States might send *mass* mailings to *all* voters, and follow up with notices for voters whose mailings are returned as undeliverable. *E.g.*, Ala. Code § 17-4-30(a). But that might entail significant costs, using funds that States might believe are better spent elsewhere. In 2016, for example, Ohio spent roughly $1.25 million to mail absentee-ballot applications to most registered voters. Walsh Decl., R.49-9, PageID#22520; Damschroder Decl., R.38-2, PageID#296. It also paid to join the Electronic Registration Information Center ("ERIC"), a non-profit corporation that requires member States to send unregistered individuals information about registering. Electronic Registration Information Center, Inc., *ERIC: Summary of Membership Guidelines and Procedures*, R.49-11, PageID#22546. Ohio sent those notices to over 1.6-million eligible, yet unregistered, Ohioans in 2016. Damschroder Decl., R.80-1, PageID#23221-22.

Further, the best maintenance programs for a State might turn on the ease with which individuals can reregister in the State. Ohio, for instance, recently approved *online* registration. Ohio Rev. Code § 3503.20. Laws making it easier to register both enhance the need for maintaining accurate lists, and reduce the burdens on those required to reregister.

In short, the Sixth Circuit's view—that Congress hid far-reaching, one-size-fits-all reform in what is, at the least, an ambiguous clause—wrongly ignored basic federalism principles.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

52 U.S.C. § 20507

(Formerly 42 U.S.C. § 1973gg-6)

§ 20507. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period pro-

vided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is cur-

rently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)

(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)

(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during

that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)

(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirma-

tion by the registrant of the new address before an election official at that polling place; or

(ii)

(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place

that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney

may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

(May 20, 1993, P.L. 103-31, § 8, 107 Stat. 82; Oct. 29, 2002, P.L. 107-252, Title IX, § 903, 116 Stat. 1728.)

52 U.S.C. § 21083
(Formerly 42 U.S.C. § 15483)

§ 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to

the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. § 20501 et seq.]), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6 [52 U.S.C.S. § 20507]).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B) [52 U.S.C.S. § 20507(a)(3)(B)]), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A) [52 U.S.C.S. § 20507(a)(4)(A)]), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b) [52 U.S.C.S. § 20503(b)]), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that--

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. §§ 20501 et seq.]), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal of-

fice shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will

serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of Title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c) [52 U.S.C.S. § 20505(c)]) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)

(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot

by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C.S. § 20505]) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)

(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C. § 20505]) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq. [52 U.S.C.S. §§ 20301 et seq.]);

(ii) provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4 [52 U.S.C.S. § 20505]) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with

the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq. [52 U.S.C.S. §§ 20501 et seq.]) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003.

(Oct. 29, 2002, P.L. 107-252, Title III, Subtitle A, § 303, Oct. 29, 2002, 116 Stat. 1708.)

RECORD AND BRIEF

No. 16-980

Supreme Ct. U.S. FILED SEP 15 2017

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does Ohio's "Supplemental Process"—a list-maintenance program that relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters ... by reason of the person's failure to vote"?

CORPORATE DISCLOSURE STATEMENT

Respondent Ohio A. Philip Randolph Institute has no parent company, and no publicly traded company owns 10% or more of its stock.

Respondent Northeast Ohio Coalition for the Homeless has no parent company, and no publicly traded company owns 10% or more of its stock.

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Arizona v. Inter Tribal Council of Ariz., Inc.,
133 S. Ct. 2247 (2013) ..... *passim*

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
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Barnhart v. Sigmon Coal Co.,
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Burrage v. United States,
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Clinton v. City of New York,
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CSX Transp., Inc. v. McBride,
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Duncan v. Walker,
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Ex Parte Siebold,
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FDA v. Brown & Williamson Tobacco Corp.,
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Gonzales v. Oregon,
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Gregory v. Ashcroft,
501 U.S. 452 (1991) 55

Hemi Grp., LLC v. City of New York,
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Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 28

Holmes v. Sec. Inv'r Prot. Corp.,
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Husky Int'l Elecs., Inc. v. Ritz,
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Jama v. Immigration & Customs Enf't,
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King v. Burwell,
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Loughrin v. United States,
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Mims v. Arrow Fin. Servs.,
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N.Y. State Dep't of Soc. Servs. v. Dublino,
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Paroline v. United States,
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Postmaster-Gen. of U.S. v. Early,
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Red Lion Broad. Co. v. FCC,
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Cited Authorities

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Reno v. Flores,
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Richards v. United States,
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Ross v. Blake,
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Seminole Tribe of Fla. v. Florida,
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Staub v. Proctor Hosp.,
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TRW Inc. v. Andrews,
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Whitman v. Am. Trucking Ass'ns,
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Will v. Mich. Dep't of State Police,
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STATUTES AND CONSTITUTIONAL PROVISIONS

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U.S. Const. art. I, § 4 4

52 U.S.C. § 20501(a) 1, 3, 4

52 U.S.C. § 20501(b) 4, 30, 53

52 U.S.C. § 20503 4

52 U.S.C. § 20504 4

52 U.S.C. § 20504(d) 5, 14, 43

52 U.S.C. § 20505 4

52 U.S.C. § 20506 4

52 U.S.C. § 20506(a) 14, 43

52 U.S.C. § 20507 ..... 1, 5

52 U.S.C. § 20507(a) ..... *passim*

52 U.S.C. § 20507(b) ..... *passim*

52 U.S.C. § 20507(c) ..... *passim*

52 U.S.C. § 20507(d) ..... *passim*

52 U.S.C. § 20507(f) 5, 14

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52 U.S.C. § 21083(a) ..... *passim*

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52 U.S.C. § 21145(a) 10, 23, 44, 45

52 U.S.C. §§ 10101-10702 3

Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 .....8, 45

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1994 Fla. Laws 1552-53 13

1994 Iowa Acts 434 13

1994 Md. Laws 1967 13

1994 N.J. Laws 1302-03 13

1994 N.Y. Laws 3503-04 13

1994 R.I. Pub. Laws 906 13

1994 Wash. Sess. Laws 197 13

1995 Ark. Acts 4253-54 13

1995 Ind. Acts 1510 13

1995 Nev. Stat. 2279-80 13

1995 Utah Laws 475 13

1996 S.C. Act 3688 13

Cited Authorities

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1996 Va. Acts 91 13

1997 Vt. Acts & Resolves 190-92 13

1998 Alaska Sess. Laws Ch. 63:1-2 13

1998 S.D. Sess. Laws. Ch. 79 § 1-138 13

2000 Miss. Laws 378 13

2001 Mich. Pub. Acts 1663 13

2001 N.C. Sess. Laws 946 13

2008 N.M. Laws 792 13

2013 Colo. Sess. Laws 700-02 13

2017 Tenn. Pub. Acts Ch. 245 1-2 13

Ala. Code § 17-4-30(a) 15

Alaska Stat. § 15.07.130 11

Ariz. Rev. Stat. § 16-166 ..... 14, 15

Ark. Const. amend. 51 § 10(d) 14

Cal. Elec. Code § 2200 15

Cal. Elec. Code § 2222 14

Cal. Elec. Code § 2225 14

Colo. Rev. Stat. § 1-2-302.5 14

Colo. Rev. Stat. § 1-2-605(1) 15

Conn. Gen. Stat. § 9-32 ..... 14, 15

Cited Authorities

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D.C. Code § 1-1001.07(j) 14, 15

Del. Code tit. 15, § 1704 15

Fla. Stat. § 98.065 .....14, 15

Ga. Code § 21-2-233 14

Ga. Code § 21-2-234 16

Ga. Code § 21-2-235 16

Haw. Code R. § 3-172-26 13

Ill. Admin. Code tit. 26, § 216.50 13

Ind. Code § 3-7-38.2-2 .....14, 15

Iowa Code § 48A.27(4) 14

Iowa Code § 48A.28(2) 15

Kan. Stat. § 25-2316c(e) 14

Ky. Rev. Stat. § 116.112 14

La. Stat. § 18:192(A) 14

Mass. Gen. Laws ch. 51, § 4 15

Mass. Gen. Laws ch. 51, § 37 15

Md. Code, Elec. § 3-502(c) 14

Mich. Comp. Laws § 168.509aa 14

Mo. Stat. § 115.179 14

Mo. Stat. § 115.181 14

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Mont. Code § 13-2-220 ..... 14, 16

N.C. Gen. Stat. § 163-82.14(a) 14

N.J. Stat. § 19:31-15 14

N.M. Code R. § 1.10.35.9 ..... 14, 15

N.Y. Elec. Law § 5-712(2) 14

Neb. Rev. Stat. § 32-329 ..... 14, 15

Nev. Rev. Stat. § 293.5303 14

Nev. Rev. Stat. § 293.5307 14

Ohio Rev. Code § 3503.21(A) 16

Ohio Rev. Code § 3503.21(B) 14, 16

Okla. Stat. tit. 26, § 4-118.1 14

Okla. Stat. tit. 26, § 4-120.2 ..... 14, 16

Or. Rev. Stat. § 247.013 16

Or. Rev. Stat. § 247.292(1) 14

Or. Rev. Stat. § 247.295 14

Or. Rev. Stat. § 247.563 14

S.D. Codified Laws § 12-4-19 ..... 11, 14

Tenn. Code § 2-2-106(c) 14, 15

Tex. Elec. Code § 15.022 14

Tex. Elec. Code § 15.051 14

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Va. Code § 24.2-428 14

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W. Va. Code § 3-2-26 16

Wash. Rev. Code § 29A.08.620 ..... 14, 15

OTHER AUTHORITIES

2 The New Shorter Oxford English Dictionary (1993) 27

Alexander Keyssar, *The Right to Vote* (2009) 3

Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016 18

Br. for the United States as Amicus Curiae Supp. Pls.-Apps., A. Philip Randolph Inst. v. Husted, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 ..... *passim*

Fed. Election Comm'n, *A Rep. to the 107th Cong.: The Impact of the Nat'l Voter Registration Act of 1993 on the Admin. of Elections for Fed. Office 1999-2000* (June 30, 2001) 50

H.R. Rep. No. 103-9 (1993) ..... *passim*

H.R. Rep. No. 107-329 (2001) 8

H.R. Rep. No. 107-730 (2002) (Conf. Rep.) 10, 51

Cited Authorities

Page

Fed. Election Comm'n, *Implementing the Nat'l Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* (Jan. 1, 1994) 50

Ohio Sec'y of State, *Secretary Husted Announces National Partnership to Increase Voter Registration, Improve Voter Rolls* (June 14, 2016) 15

Ohio Sec'y of State, *Voter Turnout in General Elections* 31

Oxford English Dictionary (2d ed. 1989) 38

S.874, 101st Cong., § 6(d) 41

S. Rep. No. 103-6 (1993) ..... *passim*

INTRODUCTION

Ohio assumes that a registered voter who has not voted or engaged in other voter activity for two years "may have moved." Directive 2015-09, R.42-2, PageID#1588. It directs county boards of elections to mail "confirmation notices" to all such voters, and to remove anyone who fails to respond to a single notice and fails to vote in the next four years. *See id.* PageID#1587-88, PageID#1591-92. Countless eligible voters across Ohio have been purged from the voter rolls pursuant to this so-called "Supplemental Process"—even where, as in the case of Respondent Larry Harmon, Ohio's own records show that the voter has not moved.

Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507 ("Section 8"), protects registered voters against removal from the voter rolls simply for failing to vote and requires that, once registered, voters remain on the rolls so long as they are eligible to vote. Prior to the NVRA, states commonly purged registrants if they failed to vote and required them to re-register. Congress found that these and other "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." *Id.* § 20501(a)(3).

The NVRA specifies that registrants may not be removed from the list of eligible voters except in five specific circumstances: when they have requested to be removed, been convicted of a crime, become mentally incapacitated, died, or moved out of the jurisdiction. *Id.* § 20507(a)(3)-(4). By removing people for failing to vote and

failing to respond to a notice, Ohio's Supplemental Process ignores this restriction, and violates subsection 8(a).

The NVRA also specifically prohibits "[a]ny State program or activity" that "result[s] in the removal ... of any person from the official list of voters registered to vote ... by reason of the person's failure to vote." *Id.* § 20507(b)(2). Congress reaffirmed this prohibition in the Help America Vote Act of 2002 ("HAVA"). As the Sixth Circuit correctly held, Ohio's Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Appendix to Petition for Certiorari ("Pet. App.") at 24a. It therefore violates subsection 8(b).

Petitioner maintains that the Supplemental Process is authorized under subsection 8(d). But as the statute makes clear, subsection 8(d) sets forth a procedure that states must follow "to *confirm* [a registrant's] change of address" before removing her from the rolls; it is not a license to impose burdens on those who exercise their right not to vote but have not moved. 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added).

Absent the decision below, the ballots of more than 7,500 eligible Ohioans would have gone uncounted in the November 2016 election. Pet. Br. at 14. None of these voters had become ineligible to vote by reason of a change in residence or otherwise; nonetheless, all had been purged from the rolls pursuant to the Supplemental Process. *See, e.g.*, Directive 2016-39, R.90-1, PageID#23354-55. That result is contrary to the language and purpose of the NVRA. This Court should affirm.

STATEMENT OF THE CASE

A. Historical Backdrop of the National Voter Registration Act of 1993

In enacting the NVRA, one of Congress's important goals was to eliminate "discriminatory and unfair registration laws and procedures." 52 U.S.C. § 20501(a)(3). Many states had "complex, cumbersome ... procedures" for voter registration, first imposed in the late nineteenth century in response to surging immigration and the enfranchisement of former slaves. Alexander Keyssar, *The Right to Vote*, at 85-86, 103-04, 252-54 (2009). These procedures dictated when and where people had to register, how frequently they had to re-register, and whether "the names of nonvoters were periodically 'purged'" from the rolls. *Id.* at 254; *see also id.* at 124. Procedures requiring voters to renew their registrations "whenever [they] failed to vote in an election ... sharply depressed turnout[.]" *Id.* at 124. Such requirements disproportionately disenfranchised "African-American, working-class, immigrant, and poor voters[.]" *Id.* at 253; *see also id.* at 124.

Even after passage of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. §§ 10101-10702, there remained a "complicated maze of local laws and procedures ... through which eligible citizens had to navigate in order to exercise their right to vote." H.R. Rep. No. 103-9, at 3 (1993). Some were "as restrictive as the ... practices" outlawed by the VRA. *Id.* States commonly purged registrants from the rolls if they failed to vote, "requir[ing] eligible citizens to re-register when they ha[d] chosen not to exercise their right to vote." S. Rep. No. 103-6, at 18 (1993). Some states

did so without notice, while others informed registrants their registrations would be cancelled if they did not respond to a notice. *See* Pet. Br. at 4 nn.1-2.

B. The National Voter Registration Act of 1993

In 1993, Congress passed the NVRA pursuant to its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1—which "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections," including "regulations relating to 'registration,'" *Arizona v. Inter Tribal Council of Ariz., Inc.* ("*ITCA*"), 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1952)). Congress recognized that the "failure to be[] registered is the primary reason given by eligible citizens for not voting." H.R. Rep. No. 103-9, at 3. It found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation ... and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). Congress therefore passed the NVRA to "increase the number of eligible citizens who register to vote," "enhance[] the participation of eligible citizens as voters in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b)(1), (2), (4).

The NVRA realizes these purposes by establishing a comprehensive national framework for voter registration in federal elections. First, it provides that states "shall establish procedures to register to vote" through motor vehicle offices, by mail, and through public assistance agencies. *Id.* §§ 20503-20506. Second, it makes voter

registration portable by requiring states to update a registrant's voter-registration address when she changes her address in connection with a driver's license or when she moves within the same registrar's jurisdiction. *See id.* §§ 20504(d), 20507(f).

Third, the NVRA sets forth requirements concerning the "administration of voter registration" lists. *Id.* § 20507. "[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19. Section 8 requires that "each State shall ... ensure that any eligible applicant" who submits a voter registration application in accordance with the statute "is registered to vote." 52 U.S.C. § 20507(a)(1). And it limits how, when, and why registrants may be removed from the rolls. *See id.* § 20507(b)-(d).

Specifically, subsection 8(a) mandates that registrants may be removed from the rolls for only five specific reasons: (1) at the individual's request; (2) by reason of criminal conviction; (3) by reason of mental incapacity; (4) by reason of death; or (5) by reason of a change in residence. It provides, in relevant part,

> (a) ... each state *shall*—
>
> ...
>
> (3) provide that the name of a registrant *may not* be removed from the official list of eligible voters except—

> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) as provided under paragraph (4);
>
> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d).

Id. § 20507(a)(3)-(4) (emphases added). Thus, subsection 8(a) mandates that in adopting programs that aim "to remove ... ineligible voters ... by reason of ... a change in the residence of the registrant," states do not have unfettered discretion, but must conduct such programs "in accordance with subsections (b), (c), and (d)." *Id.* § 20507(a)(4)(B).

Subsection 8(b) then provides that "[a]ny State program or activity" to "ensure[] the maintenance of an accurate and current voter registration roll ... shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). In enacting this broad prohibition, Congress

recognized that "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17. Congress found that while many states had used non-voting

> merely as an inexpensive method for eliminating persons believed to have moved or died, many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

Id. at 17-18. Congress also found that these programs were "highly inefficient and costly" and "unnecessarily place[d] additional burdens on the registration system because persons who [were] legitimately registered must be processed all over again." *Id.* at 18.

Subsections 8(c) and 8(d) impose further restrictions on removal from the rolls for a change in residence. Subsection 8(c) provides that "a State may meet the requirement" of removing registrants who have become ineligible because of a change in residence by identifying "registrants whose addresses may have changed" using "information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A). However, even if "it appears from information provided by the Postal Service that" a registrant has "moved to a different residence address not in the same registrar's jurisdiction," states may not remove the registrant immediately. They must first "use[] the notice procedure described in subsection (d)(2) to confirm the change of address." *Id.* § 20507(c)(1)(B)(ii).

Subsection 8(d) establishes what Petitioner refers to as the "Confirmation Procedure," Pet. Br. at 7. It requires that a registrant be sent a notice "by forwardable mail" along with "a postage prepaid and pre-addressed return card ..., on which the registrant may state his or her current address." *Id.* § 20507(d)(2). Subsection 8(d)(1) mandates that a "State shall not remove the name of a registrant from the official list of eligible voters ... on the ground of changed residence unless" it follows this procedure and the registrant "has failed to respond to [the] notice," and "has not voted or appeared to vote ... in an election during the period beginning on the date of the notice and ending" after two federal election cycles have passed. *Id.* § 20507(d)(1)(B).

In sum, subsections 8(a), (b), (c), and (d) together establish that a registrant's failure to vote may be used only to confirm that she has "moved to a different residence address not in the same registrar's jurisdiction," and only after the voter has been sent a formal notice. *Id.* § 20507(a)-(d).

C. The Help America Vote Act of 2002

Congress passed the Help America Vote Act of 2002 ("HAVA") to "assist[] state and local government in modernizing their election systems." *See* H.R. Rep. No. 107-329, at 32 (2001). Two provisions of HAVA touch on the NVRA's prohibition on using failure to vote in list-maintenance programs.

HAVA amended subsection 8(b)(2) of the NVRA by adding what Congress expressly designated a "clarification." *See* Pub. L. No. 107-252, § 903, 116

Stat. 1666 (2002). As amended, subsection 8(b)(2) of the NVRA now reads:

> Any state program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll ... (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. § 20507(b)(2) (HAVA amendment in italics). As its title makes clear, this amendment was intended to clarify, but not alter, subsection 8(b)(2)'s prohibition on list-maintenance programs that rely on failure to vote. The amendment clarifies that the Confirmation Procedure constitutes a single exception to subsection 8(b)(2)'s prohibition: A list-maintenance program may result in removal by reason of failure to vote *only* where failure to vote is used to *confirm* the state's prior determination that a registrant may have become ineligible due to a change in residence, as specifically described in subsections 8(c) and 8(d).

HAVA subsection 303(a)(4)(A) similarly reaffirms the NVRA's requirements. Section 303 requires each state to establish a computerized statewide voter-registration database and maintain it "consistent with the [NVRA]." *Id.* § 21083(a). It also reaffirms the requirement that:

> registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

Id. § 21083(a)(4)(A). In adopting the NVRA's list-maintenance provisions, Section 303 does not expand the grounds for removal, which remain limited to those enumerated in subsection 8(a) of the NVRA.

Congress expressly provided that, with one exception not relevant here, HAVA was not intended to make any substantive changes to the NVRA: "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* § 21145(a). The HAVA Conference Report re-emphasized that HAVA does not "undermine [the NVRA] in any way," and that the NVRA's procedures that "guard against removal of eligible registrants remain in effect under [HAVA]." H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.).

D. Department of Justice Interpretation

Until it reversed its longstanding interpretation of the NVRA and filed its amicus brief in this Court, the

Department of Justice ("DOJ")—the agency tasked with enforcing the NVRA, *see* 52 U.S.C. § 20510—consistently took the position that the NVRA prohibits list-maintenance programs in which states simply assume non-voters have moved and send them subsection 8(d)(2) notices (and then remove them from the rolls if they do not respond and do not vote). In 1994, DOJ advised Georgia that its then-proposed program to "send[] a registration confirmation notice to persons who have not voted ... during a three-year period" was "directly contrary to the language and purpose of the NVRA." Br. for the United States as *Amicus Curiae* Supp. Pls.-Apps., *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 ("U.S. C.A. Br."), Attachment 2, at 1-2. In 1996, DOJ argued that Pennsylvania's law requiring that registrants who did not vote over a five-year period be sent a subsection 8(d)(2) confirmation notice "runs afoul of Section 8(b)(2)'s prohibition on purges for non-voting." *Id.*, Attachment 3, at 17.

In 1997, DOJ sent "notice-of-intent-to-sue letters to Alaska and South Dakota." *Id.* at 3. "Each state had adopted purging procedures that used nonvoting to trigger the Section 8(d) notice and cancellation process." *Id.* at 15. After receiving DOJ's letters, both states eliminated these procedures and adopted programs that require evidence of changed residence in the form of mail returned as undeliverable before the state initiates the subsection 8(d) Confirmation Procedure. *See* Alaska Stat. § 15.07.130(a)-(b); S.D. Codified Laws § 12-4-19.

Post-HAVA, DOJ continued to interpret and enforce Section 8 in the same way. In 2007, it obtained a stipulation with Cibola County, New Mexico, prohibiting placing

"the name of any voter on the inactive list or otherwise remov[ing] the voter's name from the official registration list solely by reason of the person's failure to vote." U.S. C.A. Br., Attachment 7, at 9. The settlement further required that registrants may be placed "on an inactive list" and targeted for eventual removal based *only* on "objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address." *Id.*[1]

In 2010, DOJ issued NVRA guidance explaining that the subsection 8(d) Confirmation Procedure may be used only *after* a state receives "reliable second-hand information indicating a change of address outside of the jurisdiction" such as that provided by the Postal Service or when mail is returned to the sender as undeliverable. U.S. C.A. Br. at 15-16 (quoting then-effective DOJ guidance, ¶¶ 33-34).

In 2016, the United States filed a statement of interest in *Common Cause v. Kemp*, No. 16-cv-452 (N.D. Ga.

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[1] In a case challenging Philadelphia's failure to remove registrants on the ground of death (not changed residence), *see* U.S. C.A. Br., Attachment 10, the United States entered into a settlement allowing Philadelphia, like all other Pennsylvania jurisdictions, to comply with Pennsylvania law, by permitting the city to send a "forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner, and whose contact resulted in a change in his or her voter record." *Id.*, Attachment 11, ¶ 16. DOJ never stated that this Pennsylvania law complies with Section 8; "to the contrary, the Department specifically argued in separate litigation ... that Pennsylvania's voter list maintenance procedures violated Section 8 for the same reason Ohio's does." *Id.* at 26.

Feb. 10, 2016), arguing that states may not "consider a registered voter's failure to vote to be reliable evidence that the voter has become ineligible by virtue of a change in residence, thus triggering the [subsection 8(d) Confirmation Procedure]." U.S. C.A. Br., Attachment 1, at 2. The United States maintained the same position in this case in the court below. *See infra* Statement of the Case ("SOC"), Part G.

E. State Practices

The NVRA substantially altered the way states maintain their rolls. At the time of the NVRA's passage, many states had statutes that required or permitted purging registrants for failure to vote, either with or without notice. *See* Pet. Br. at 4 nn.1-2. After the NVRA's passage, most of these states repealed or abandoned those programs.[2]

The NVRA itself provides various mandatory mechanisms to ensure voter roll accuracy. It requires that a change-of-address form submitted for purposes of updating a driver's license "shall serve as [a] change of

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[2] *See* 69 Del. Laws 481 (1993); 1994 Fla. Laws 1552-53; 1994 Iowa Acts 434; 1994 Md. Laws 1967; 1994 N.J. Laws 1302-03; 1994 N.Y. Laws 3503-04; 1994 R.I. Pub. Laws 906; 1994 Wash. Sess. Laws 197; 1995 Ark. Acts 4253-54; 1995 Ind. Acts 1510; 1995 Nev. Stat. 2279-80; 1995 Utah Laws 475; 1996 S.C. Act 3688; 1996 Va. Acts 91; 1997 Vt. Acts & Resolves 190-92; 1998 Alaska Sess. Laws Ch. 63:1-2; 1998 S.D. Sess. Laws. Ch. 79 § 1-138; 2000 Miss. Laws 378; 2001 Mich. Pub. Acts 1663; 2001 N.C. Sess. Laws 946; 2008 N.M. Laws 792; 2013 Colo. Sess. Laws 700-02; 2017 Tenn. Pub. Acts Ch. 245 1-2; Ill. Admin. Code tit. 26, § 216.50; Haw. Code R. § 3-172-26.

address for voter registration," 52 U.S.C § 20504(d); that state agencies distribute a voter-registration form "with each ... change of address form relating to [disability] service[s] or [public] assistance," *id.* § 20506(a)(6)(A); and that "[i]n the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly," rather than removing the registrant, *id.* § 20507(f).

Most states also update voter lists by obtaining direct evidence of changed residence and then confirming that information with the Confirmation Procedure. At least 35 states permit or require use of information from the Postal Service regarding changed residence, consistent with subsection 8(c)(1).[3] At least 12 states send list-maintenance mailings to all or some registrants, and treat *those returned as undeliverable* as evidence of

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[3] *See, e.g.*, Ariz. Rev. Stat. § 16-166(E); Ark. Const. amend. 51 § 10(d); Cal. Elec. Code §§ 2222, 2225; Colo. Rev. Stat. § 1-2-302.5; Conn. Gen. Stat. § 9-32; D.C. Code § 1-1001.07(j)(1)(D); Fla. Stat. § 98.065(2)(a); Ga. Code § 21-2-233; Ind. Code § 3-7-38.2-2(c)(1); Iowa Code § 48A.27(4); Kan. Stat. § 25-2316c(e)(2); Ky. Rev. Stat. § 116.112; La. Stat. § 18:192(A); 29-250-505 Me. Code R. § 1(2)(C); Md. Code, Elec. § 3-502(c); Mich. Comp. Laws § 168.509aa; Mo. Stat. §§ 115.179, 115.181; Mont. Code § 13-2-220(1)(a); Neb. Rev. Stat. § 32-329; Nev. Rev. Stat. §§ 293.5303, 293.5307; N.J. Stat. § 19:31-15; N.M. Code R. § 1.10.35.9(A)(1); N.Y. Elec. Law § 5-712(2); N.C. Gen. Stat. § 163-82.14(a); Ohio Rev. Code § 3503.21(B); Okla. Stat. tit. 26, §§ 4-118.1, 4-120.2(A)(4); Or. Rev. Stat. §§ 247.292(1)(b), 247.295, 247.563; 25 Pa. Cons. Stat. § 1901(b)(1)(i); 17 R.I. Gen. Laws § 17-9.1-27(a); S.D. Codified Laws § 12-4-19; Tenn. Code § 2-2-106(c); Tex. Elec. Code §§ 15.022(a)(6), (b), 15.051; Va. Code § 24.2-428; Wash. Rev. Code § 29A.08.620(1), (4)(b); W. Va. Code § 3-2-25(d), (e).

changed residence for follow-up with the Confirmation Procedure.[4] Other states permit obtaining evidence of changed residence through door-to-door canvasses,[5] or through interstate data-sharing programs for driver's-license[6] and voter-registration information.[7]

F. Ohio's Supplemental Process

Ohio is one of the very few states retaining a purge program that assumes failure to vote indicates a

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[4] *See, e.g.*, Ala. Code § 17-4-30(a) (all registrants); Ariz. Rev. Stat. § 16-166(A) (general mailings to all registrants); Cal. Elec. Code § 2200 (all registrants); Colo. Rev. Stat. § 1-2-605(1); D.C. Code § 1-1001.07(j)(1)(A) (registrants who did not vote in two-year cycle); Fla. Stat. § 98.065 (all registrants or only non-voters); Iowa Code § 48A.28(2) (registrants who have not voted in two or more consecutive elections); Ind. Code § 3-7-38.2-2 (all active voters); 29-250-505 Me. Code R. § 1(2)(B) (registrants who have not voted in the most recent general election); Neb. Rev. St. § 32-329 (all registrants); N.M. Code R. 1.10.35.9 (same); Tenn. Code § 2-2-106(c)(1) (same); Wash. Rev. Code § 29A.08.620 (same).

[5] *See, e.g.*, Conn. Gen. Stat. § 9-32(a); Mass. Gen. Laws ch. 51, §§ 4(a), 37.

[6] *See, e.g.*, Del. Code tit. 15, § 1704 (identify registrants who have obtained driver's license or state identification in new state); Ind. Code § 3-7-38.2-2 (same).

[7] According to Petitioner, 20 states participate in the Electronic Registration Information Center ("ERIC") system, which "uses a combination of public and private data to help states more accurately identify voters who have moved or died so the voter rolls can be appropriately updated." Ohio Sec'y of State, Secretary Husted Announces National Partnership to Increase Voter Registration, Improve Voter Rolls (June 14, 2016), https://www.sos.state.oh.us/media-center/press-releases/2016/2016-06-14/.

registrant has moved, and sends subsection 8(d)(2) notices to registrants on that basis alone.[8]

Under Ohio law, a voter's registration "shall be canceled upon ... [t]he change of residence of the registered elector to a location outside the county of registration...." Ohio Rev. Code § 3503.21(A)(6). Petitioner uses two list-maintenance programs to identify registrants who may have become ineligible to vote by reason of a change in residence. *E.g.*, Directive 2015-09, R.42-2, PageID#1587-88. One conforms to the NVRA's subsection 8(c) program, using Postal Service change-of-address information, and is established by statute. *See* Ohio Rev. Code § 3503.21(B)(1).

The other is the Supplemental Process, which is not set forth by statute and was instead created by the Ohio Secretary of State through a series of directives. The Supplemental Process "seeks to identify electors whose lack of voter initiated activity indicates they may have moved." Directive 2015-09, R.42-2, PageID#1588. It directs county boards of elections to send confirmation notices to registrants based solely on a failure to vote for a two-year period, and to remove any registrant who fails to respond to the notice and fails to engage in voter activity in the subsequent four years. *See id.* PageID#1587-88, PageID#1591-92.[9]

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[8] Six states maintain statutorily-mandated programs along these lines. *See* Ga. Code §§ 21-2-234, 21-2-235; Mont. Code § 13-2-220; Okla. Stat. tit. 26, § 4-120.2; Or. Rev. Stat. § 247.013; 25 Pa. Cons. Stat. § 1901(b)(3); W. Va. Code §§ 3-2-25, 3-2-26.

[9] From 1994 to 2014, this program was deployed every two years. In 2014, Petitioner, without guidance from the state legislature, entered into an out-of-court settlement with private groups requiring

"When this litigation began, the confirmation notices ... required that voters provide their name, current Ohio address, date of birth, and either their Ohio driver's license number, their Social Security number, or a copy of a document verifying their identity and address ... regardless of whether they had changed address or were merely confirming that they still lived at the same address." Pet. App. at 5a-6a. As a result of this lawsuit, Petitioner promulgated a new confirmation notice form that requires registrants who have not changed their address to confirm their registrations by signing, dating, and returning the form. *Id.* at 6a.

The Supplemental Process purged eligible Ohio voters, including Respondent Larry Harmon, a U.S. Navy veteran and registered Ohio voter who has resided at the same address for more than 16 years. *See* Harmon Decl., R.9-4, ¶¶ 2-3. After voting in the 2008 presidential election, Mr. Harmon opted not to vote in 2009 or 2010. *Id.* ¶ 6. Although Ohio's records indicate Mr. Harmon was sent a confirmation notice in June 2011, he does not recall receiving it, *id.* ¶ 10. In the subsequent four years, Mr. Harmon expressed his dissatisfaction with the candidates by exercising his right not to vote. *Id.* ¶ 6. In September 2015, Mr. Harmon's registration was cancelled pursuant to the Supplemental Process, even though he had not changed his residence or otherwise become ineligible to vote. Mr. Harmon did not learn that he had been purged from the rolls until he went to vote in Ohio's November 2015 election and discovered he was not registered and that his vote would therefore not be counted. *Id.* ¶¶ 8-11.

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that the Supplemental Process be undertaken annually. Settlement Agreement, *Judicial Watch v. Husted*, R.38-4, PageID#370.

Many registrants across Ohio have been similarly disenfranchised. A preliminary review of several of Ohio's 88 counties uncovered over 600 eligible voters whose provisional ballots went uncounted in just the November 2015 and March 2016 elections because they had been purged under the Supplemental Process even though they had *not moved* and *remained eligible to vote*. Pls.' Mot. for Summ. J., R.39, PageID#1386-88.[10] A Reuters analysis found that, in Ohio's most populous counties, "neighborhoods that have a high proportion of poor, African-American residents are hit hardest" by the Supplemental Process. *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016, http://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D.

G. Proceedings Below

On April 6, 2016, Respondents filed suit in the U.S. District Court for the Southern District of Ohio. Complaint, R.1. On June 29, 2016, after limited discovery and briefing, the district court granted judgment in favor of Petitioner. Pet. App. at 69a-70a.

Respondents filed a notice of appeal to the Sixth Circuit the next day. Notice of Appeal, R.68. Given the impending presidential election, the Sixth Circuit ordered expedited briefing and argument. Order, *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 6, 2016), ECF No. 14-1. The United States filed an *amicus* brief supporting

[10] Due to the impending election, the parties agreed to limited discovery. Respondents were therefore not able to determine the full number of eligible persons denied the right to vote.

Respondents, arguing that Section 8—"when construed in light of its text, structure, purpose, and history—requires that before a State can start the confirmation process that leads to removal of voters from its voter registration rolls based on a change of residence, it must have reliable evidence that the voter has moved," and that "[d]eclining to vote does not provide such evidence." U.S. C.A. Br. at 8. The United States further asserted that "triggering the confirmation process based solely on voter inactivity, as Ohio does through its Supplemental Process, inevitably results in the removal of voters based on nonvoting, which violates the NVRA and HAVA." *Id.* "Because it is a *confirmation* process, Section 8(d) requires some *initial* evidence that a voter has moved. Without some initial evidence of a change in residence, there would be nothing to confirm." *Id.* (emphasis added).[11]

On September 23, 2016, the Sixth Circuit reversed the district court. It observed that under subsection (8)(a) of the NVRA, "a registrant *may not* be removed from the official list of eligible voters *except*" under one of the five grounds enumerated in that subsection, including a registrant's change in residence to another jurisdiction. Pet. App. at 11a (quoting 52 U.S.C. § 20507(a)(3)). It further noted that subsection 8(b) prohibits any state program or activity that "result[s] in the removal" of any registrant "by reason of the person's

[11] On August 2, 2017, citing the recent "change in Administrations," the United States reversed the interpretation of Section 8 that it had consistently maintained under both Democratic and Republican administrations for over two decades, and filed a brief in support of Petitioner. U.S. Br. at 14. On the same day, DOJ altered its online NVRA guidance to align with the new position asserted in the United States' brief. *Id.* at 14 n.4.

failure to vote." *Id.* at 11a-12a. The Sixth Circuit concluded that the Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote" and therefore violates Section 8. *Id.* at 24a.[12]

On remand, the district court ordered relief applicable only to the November 2016 election, requiring Ohio to count the ballots of any voters removed under the Supplemental Process between 2011 and 2015 who voted a provisional ballot in person, so long as the voter had not become ineligible through a change in residence or otherwise. *Id.* at 94a-100a.

As a result of this relief, the votes of at least 7,515 eligible Ohioans were counted in the November 2016 election. Pet. Br. at 14. Had the Supplemental Process not been enjoined, these indisputably eligible voters would have been disenfranchised. Moreover, this number understates the full impact: it does not include any purged voter who attempted to vote by mail, learned she had been purged and did not try to vote, appeared at the polls but left without casting a provisional ballot, successfully re-registered before the election, or decided not to vote in 2016.

After the election, the parties resumed litigation concerning remedial issues.

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[12] The Sixth Circuit did not analyze Respondents' alternative claim that the Supplemental Process erroneously removes many eligible voters, thereby violating Section 8's requirement that states' efforts to remove registrants who have become ineligible by reason of changed residence be reasonable. *See* Pet. App. at 23a-24a.

When this Court granted certiorari, the parties stipulated to a stay of the district court proceedings pending resolution of the issues before this Court. As part of this stipulation, Petitioner agreed to continue to abide by the interim relief that was in place in November 2016 for all elections occurring while the case is before this Court. Order, R.118, PageID#23915.

SUMMARY OF THE ARGUMENT

I. Ohio's Supplemental Process violates Section 8 of the NVRA.

A. Subsection 8(a) of the NVRA permits states to remove registrants from the voter rolls for only five expressly delineated reasons. 52 U.S.C. § 20507(a)(3)-(4). Neither failure to vote nor failure to respond to a notice—which Petitioner contends is the "sole proximate cause" of a registrant's removal under the Supplemental Process, Pet. Br. at 14—is one of them. The Supplemental Process therefore violates subsection 8(a).

B. Subsection 8(b) of the NVRA further prohibits states from employing any "program or activity" for voter-roll maintenance that "result[s] in" removal of a registrant "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). "A thing 'results' when it '[a]rise[s] as an effect, issue, or outcome from some action, process or design.'" *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (citation omitted). Subsection 8(b) thus broadly prohibits programs that have the "effect" or "outcome" of removing registrants by reason of their failure to vote, even when that is not the immediate, intended, or expressly stated reason for removal. The

Supplemental Process plainly has the effect or outcome of removing registrants "by reason of" their failure to vote. Registrants are subjected to the Supplemental Process based solely on their failure to vote in a single federal election period, and they are then purged based in part on their failure to vote in two more federal elections.

Borrowing from inapposite statutory-tort cases, Petitioner incorrectly argues that subsection 8(b) prohibits list-maintenance programs only where non-voting is the "proximate cause" of removal. Petitioner's proximate-cause analysis is inapplicable here. Regardless, failure to vote *is* the proximate cause of removal under the Supplemental Process, because non-voters are singled out for failing to vote, sent confirmation notices, and then removed as a direct result of their failure to vote—without any affirmative evidence that they have changed residence or otherwise become ineligible.

C. HAVA's amendment to Section 8 of the NVRA clarified that subsection 8(b)'s prohibition on programs that "result in removal ... by reason of the person's failure to vote" does not "prohibit a State from using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2). But the Supplemental Process is not saved by this exception because it relies on failure to vote in a way not "described in subsections (c) and (d)." *Id.* It is therefore barred by subsection 8(b).

Subsection 8(d), which Petitioner concedes is a "Confirmation Procedure," Pet. Br. at 7, sets forth a specific notice procedure, used only to "confirm" that a registrant has become ineligible to vote due to a change in residence. 52 U.S.C. § 20507(c)(1), (d). Under the

procedure described in subsection 8(d), failure to vote may be considered at *one* point in the removal process, *after* a notice has been sent.

The Supplemental Process, by contrast, uses failure to vote not once, to *confirm* a change in residence after a notice has been sent, but twice. It also uses failure to vote to *determine initially* that a registrant "may have moved," Directive 2015-09, R.42-2, PageID#1588, simply because she has not voted in a single federal election cycle. Because it uses failure to vote in a way not "described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2), it falls outside of subsection 8(b)(2)'s exception and is prohibited.

II. HAVA reaffirms that the Supplemental Process violates Section 8 of the NVRA.

A. Petitioner's contention that HAVA "limit[s] the ... scope" of the NVRA, Pet. Br. at 21, is belied by HAVA's text, which makes plain that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to *supersede, restrict, or limit* the application of [the NVRA]." *Id.* § 21145(a) (emphasis added). Instead, HAVA's amendment to subsection 8(b) of the NVRA merely clarifies that the prohibition on programs that result in removing registrants by reason of their failure to vote does not proscribe the procedures described in subsections 8(c) and 8(d). As described above, that does not authorize the Supplemental Process.

B. Section 303 of HAVA reaffirms that voters may not be removed for failure to vote. It restates the requirements set forth in more detail in Section 8 of the NVRA, but by its own terms does not alter or supersede those provisions.

C. HAVA's legislative and implementation history confirms this conclusion. Petitioner cites reports from the Federal Election Commission ("FEC") to Congress in the years before HAVA was enacted, but ignores the FEC report to the very Congress that enacted HAVA reflecting its view that states could not rely on failure to vote alone to subject registrants to the subsection 8(d) Confirmation Procedure.

III.A. Interpreting the NVRA to prohibit Ohio from employing the Supplemental Process raises no constitutional concerns. This Court has repeatedly stated that prescribing voter-registration requirements falls within Congress's authority under the Elections Clause. And prohibiting the Supplemental Process does not prevent the State from enforcing its voter qualifications.

B. Applying the text of the NVRA also does not trigger the clear-statement rule or raise federalism concerns. The NVRA leaves the states considerable flexibility in how they maintain their voter rolls; it simply prohibits a narrow category of list-maintenance activities that, like the Supplemental Process, result in registered voters being removed for exercising their right not to vote.

This Court should affirm.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS VIOLATES SECTION 8 OF THE NVRA.

Section 8 of the NVRA bars the Supplemental Process, under which a registrant who fails to vote during

a single federal election cycle is removed unless she takes affirmative steps to stay on the rolls. This program cannot be reconciled with the text, structure, or purposes of the NVRA.

A. Failure to Respond to a Confirmation Notice and Failure to Vote Are Not Among the Permissible Grounds for Removal under Subsection 8(a).

Subsection 8(a) requires states to "ensure that any eligible applicant" who submits a voter-registration application in accordance with the statute "is registered to vote." It then limits removal of registrants to five exclusive circumstances. 52 U.S.C. § 20507(a). It provides "that the name of a registrant *may not* be removed from the official list of eligible voters *except*": (1) "at the request of the registrant;" or because the registrant has become ineligible to vote due to (2) a criminal conviction, (3) mental incapacity, (4) death, or (5) a change in residence. *Id.* § 20507(a)(3)-(4) (emphasis added). As the mandatory language "may not" makes plain, removal of a registrant on any other grounds is prohibited. *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) ("may not" is a mandatory statutory command).

The Supplemental Process does not remove registrants on any of the five grounds specified in subsection 8(a). The parties disagree about whether the Supplemental Process removes a registrant "by reason of his or her failure to vote" (as the Sixth Circuit held, Pet. App. at 24a), or whether "the failure to respond to a notice is the sole proximate cause of removal" (as Petitioner argues, Pet. Br. at 24). But neither failure to vote, nor failure to

respond to a notice—nor the two together—is among the grounds for removal under subsection 8(a). In fact, Congress specifically sought to prohibit list-maintenance programs that "result in the removal of the name of any person from the official list because of a failure to vote," *and* those that "result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15. The Supplemental Process therefore violates subsection 8(a).

In response, Petitioner maintains that there is "good reason not to read § 20507(a)(3) as containing the *exclusive* justifications for removal," because such a reading could prevent states from removing individuals who register unlawfully, such as "minors, fictitious individuals ... and noncitizens." Pet. Br. at 34. That is incorrect. Subsection 8(a)(1) requires states to "ensure that any *eligible* applicant is registered," and subsections 8(a)(3) and (4) only limit the removal of such "registrants." 52 U.S.C. § 20507(a)(1), (3)-(4) (emphasis added). Petitioner notes that the use of the term "registrant," shows that subsections 8(a)(3) and (4) "cover only those who were lawfully included on the rolls *at the time* they registered." Pet. Br. at 34 (emphasis in original). Individuals who were not eligible to vote when they applied to register are not lawfully on the rolls and may be removed. But someone lawfully registered under subsection 8(a)(1) may be removed only for one of the five reasons enumerated in subsection 8(a).

Because it removes lawfully registered individuals for a reason not among those enumerated in subsection 8(a), the Supplemental Process is prohibited.

B. Subsection 8(b) Prohibits List-Maintenance Programs that, Like the Supplemental Process, Result in the Removal of Registrants by Reason of Their Failure to Vote.

Under subsection 8(b):

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll ... (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote ....

52 U.S.C. § 20507(b).[13] Importantly, subsection 8(b)(2) prohibits not just removals "by reason of" failure to vote, but "[a]ny State program or activity" that "*results in*" removal of a voter "by reason of the person's failure to vote." *Id.* (emphasis added). "A thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process or design.'" *Burrage*, 134 S. Ct. at 887 (citing 2 The New Shorter Oxford English Dictionary 2570 (1993)) (emphasis and alterations in original).

By way of comparison, subsection 8(b)(2)'s "results in" language is broader than that of subsection 8(a), which permits registrants to be removed "by reason of" felony

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[13] The sole exception to this—which is not applicable to the Supplemental Process, *see infra* Part I.C.—is when a state is "using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2).

conviction, mental incapacity, death, or changed residence, without using the phrase "results in." When interpreting statutes, courts "presume [that] differences in language ... convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (citing *Loughrin v. United States*, 134 S. Ct. 2384, 2391 (2014)). The most plausible reading of the different language used in these provisions is that subsection 8(b) broadly prohibits list-maintenance programs that have the "effect" or "outcome" of removing registrants by reason of their failure to vote, even if that is not the immediate, intended, or expressly stated reason for removal.

1. The Supplemental Process Violates Subsection 8(b) Because It "Results in" Removal of Registrants "by Reason of" Their Failure to Vote.

The Supplemental Process plainly has the effect or outcome of removing registrants "by reason of" their failure to vote. Ohio subjects registrants to the Supplemental Process based solely on their failure to vote in a single federal election period—with no evidence that they have moved to another jurisdiction or otherwise become ineligible—and their registrations are cancelled unless they take affirmative steps to stay on the rolls. As the Sixth Circuit correctly held, this is "perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from rolls by reason of his or her failure to vote." Pet. App. at 24a.

Petitioner contends that the Supplemental Process uses non-voting to identify registrants who "may have moved." Pet. Br. at 10 (quoting Directive 2009-05,

R.38-7). A change in residence outside the voting jurisdiction is indeed one of the valid reasons for removal under subsection 8(a). But states cannot overcome subsection 8(b) simply by characterizing failure to vote as the equivalent of one of the permissible grounds for removal. Such a reading would leave subsection 8(b) with no meaningful force or effect, and is prohibited by the rule against "'interpret[ing] federal statutes to negate their own stated purposes.'" *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 420 (1973)).[14]

Petitioner suggests that his reading would not leave subsection 8(b)(2) without effect because that section only "bars States from using nonvoting as the sole proxy to conclude that a registrant is ineligible for *other reasons* (e.g., death)," not for a change in residence. Pet. Br. at 15-16; *see also* U.S. Br. at 24-25. But subsection 8(b) does not say that. It says it broadly applies to

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[14] The United States also ignores subsection 8(b)(2)'s "results in" language, arguing that, by prohibiting removal "by reason of" failure to vote, subsection 8(b)(2) merely makes "explicit" what is already "implicit[]" in subsection 8(a)'s prohibition on removing registrants except "by reason of" the express grounds of ineligibility. U.S. Br. at 24-25 n.7. Not only does this argument ignore subsection 8(b)'s much broader language; it relies on a disfavored "belt-and-suspenders" reading of the statute. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting." (internal citations and quotation marks omitted)); *see also United States v. Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) (Courts are not "entitled to reach [the] conclusion [that legislatures employ redundant language] lightly. Respect for democratic authority requires unelected federal judges to exercise great caution before declaring the words enacted by the people's representatives to be superfluous.").

"[a]ny State program or activity" for list maintenance, 52 U.S.C. § 20507(b) (emphasis added), and subsection 8(a)(4) specifically provides that removals due to "a change in the residence of the registrant" must be conducted "in accordance with subsections (b), (c), *and* (d)." *Id.* § 20507(a)(4)(B) (emphasis added).

In addition to finding no support in the statutory text or in logic, Petitioner's reading would also contravene Congress's intent in four ways. First, it would conflict with Congress's recognition that "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17. Treating failure to vote as a proxy for changed residence subjects those who exercise their right not to vote to a burden not faced by other voters. Second, it flouts Congress's concern that using "non-voting ... as an inexpensive method for eliminating persons believed to have moved or died" inevitably results in removal of some individuals who in fact "may not have moved or died" and remain eligible to vote in the jurisdiction. *Id.* Third, the erroneous removal of eligible registrants contravenes the NVRA's purposes of "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2). And fourth, it undermines the NVRA's express goals of "protect[ing] the integrity of the electoral process" and "ensur[ing] ... accurate and current voter registration rolls," *id.* § 20501(b)(3)-(4), because it results in "persons who are legitimately registered" not being included on the rolls, S. Rep. No. 103-6, at 18.

Failure to vote for a mere two-year period does not indicate that a registrant has moved out of the jurisdiction.

In recent midterm elections, more than half of registered voters in Ohio have not voted.[15] There is no basis to conclude that more than half of Ohio's registered voters change residence outside the jurisdiction and thereby become ineligible in the two years following a presidential election.

Petitioner makes no showing that non-voting is a reliable indicator that a registrant has moved, nor could he. Registrants may sit out elections for any number of reasons. They may be unable to vote during the allotted hours, lack access to transportation, or suffer from an illness or disability that prevents them from getting to the polls. Like Mr. Harmon, they may not be inspired by the candidates or issues in a particular election. Indeed, but for the decision below, thousands of eligible voters—whose registrations had been cancelled on the incorrect assumption that their inactivity indicated they were no longer eligible—would have been erroneously disenfranchised in the November 2016 election. *See* Pet. Br. at 14.

2. Proximate Cause Is Not Required.

Petitioner argues that for a removal program to violate subsection 8(b)(2), non-voting must "be the proximate cause of removal." Pet. Br. at 14. That is incorrect.

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[15] For example, in the 2014 general election, nearly 60% of registered Ohio voters did not vote. *See* Ohio Sec'y of State, *Voter Turnout in General Elections*, https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-general-elections (last visited September 13, 2017).

As an initial matter, Petitioner ignores the critical "results in" language discussed above, which establishes that subsection 8(b)(2) prohibits any state program that has the "effect" or "outcome" of a registrant being removed by reason of her failure to vote. *See supra* Part I.B.

And even if it were appropriate to ignore the "results in" language and focus only on the words "by reason of," the three cases Petitioner cites that have read the words "by reason of" to incorporate a common-law proximate-cause requirement all concerned statutory claims that sound in tort or that expressly incorporated background principles of tort or criminal law. They are not applicable here.

"Proximate cause is a standard aspect of causation in criminal law and the law of torts." *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014). "In a philosophical sense, the consequences of an act go forward to eternity," so to prevent "infinite liability," proximate cause places "limits on the chain of causation that may support recovery on any particular claim." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) (internal quotation marks omitted).

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983), the Court considered Section 4 of the Clayton Act, which provides a private damages action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The Court found that a "literal reading of the statute [was] broad enough to encompass every harm" that could possibly be attributed to an antitrust violation. But, in

enacting Section 4, Congress used the same language as it had in Section 7 of the Sherman Act, and courts had consistently interpreted Section 7 as incorporating background common-law principles of proximate cause. *Id.* at 529-36; *see also Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266-68 (1992) (applying the same analysis to the treble damages provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which Congress modeled on Section 4 of the Clayton Act and Section 7 of the Sherman Act).[16]

Private causes of action under the antitrust laws and RICO are akin to statutory torts. The NVRA, however, has nothing to do with tort law, and its "by reason of" language appears not in a private right of action (for damages or otherwise), but in its rules governing state voter-registration procedures for federal elections. Therefore, background common-law principles applicable in the context of tort claims or criminal law have no application when interpreting the NVRA, which must be construed in accordance with its plain language.

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[16] *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 (2010), on which Petitioner relies, also involves RICO's tort-like liability and is therefore inapposite here. Moreover, while the Court "ma[d]e clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm," it also acknowledged that there were many other "shapes" of proximate cause "at common law." *Id.* at 12.

3. Failure to Vote Is a Proximate Cause of Removal Under the Supplemental Process.

Even if proximate cause were required, failure to vote is a proximate cause of removal under the Supplemental Process. "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct. A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 134 S. Ct. at 1719 (internal citations omitted).

Here, the causal link between a registrant's failure to vote and her removal from the rolls cannot be "described as mere fortuity." It is foreseeable, even predictable, that a registrant may not respond to a single notice sent by mail—particularly when that person's address had not changed and she therefore had no new information to provide to the registrar. The only reason a registrant targeted by the Supplemental Process is sent a notice is because she has failed to vote. Thus, the failure to respond is an utterly foreseeable consequence of the registrant's failure to vote.

Petitioner's assertion that "failure to respond to a notice—not a failure to vote—is the sole proximate cause of removal under Ohio's Supplemental Process," Pet. Br. at 14, is incorrect. "[I]t is common for injuries to have multiple proximate causes." *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011). Under the Supplemental Process, a registrant is removed if she (1) fails to vote during a two-year period, (2) fails to respond to a notice, and (3) fails to

vote during the subsequent four-year period. Petitioner's insistence that the middle event—failure to respond to a notice—is the *sole* proximate cause of removal, to the exclusion of both a registrant's initial failure to vote (which starts the Supplemental Process) and her subsequent failure to vote (which concludes it), lacks any support in logic or law.

Petitioner's attempt to analogize a voter's failure to respond to a confirmation notice to "gallop[ing] violently ... into a pole," as a kind of "contributory negligence," Pet. Br. at 24-25 (internal quotation marks omitted), is even further afield. The NVRA is not a tort statute designed to allocate liability. Moreover, it makes the state, not the voter, responsible for ensuring that only registrants who have become ineligible are removed from the rolls.

Ultimately, Petitioner contends that a registrant who exercises the right not to vote in a single federal election period incurs an obligation to take affirmative measures to stop the state from purging her, even when there has been no change in her eligibility. But that construction of the NVRA allows states to "penalize such non-voters ... merely because they have failed to cast a ballot in a recent election"—a choice that Congress sought to protect. S. Rep. No. 103-6, at 17.

Finally, Petitioner argues that, because the Supplemental Process employs the subsection 8(d) Confirmation Procedure—which expressly "*requires* States to rely on the failure to vote to remove registrants"—"the Court must read 'by reason of' in such a way that the Confirmation Procedure's required use of nonvoting is not a proximate cause of removal prohibited by the Failure-To-

Vote Clause." Pet. Br. at 24 (emphasis in original). There is no need for the Court to resort to a cramped reading of the statute to reconcile these provisions, however. As explained below, *see infra* Part II, Congress addressed that question in HAVA, where it clarified that subsection 8(b) prohibits any program that results in the removal of registrants by reason of their failure to vote "except ... the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2); *see also id.* § 20507(a)(4) (requiring removals for changed residence to comply with "subsections (b), (c), *and* (d)") (emphasis added). As explained below, the Supplemental Process is not authorized by subsections 8(c) or 8(d).

C. The Supplemental Process Impermissibly Uses Failure to Vote in a Way Not "Described in" Subsections 8(c) and 8(d).

As amended by HAVA, subsection 8(b)(2) prohibits programs that "result in removal of [a registrant] by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2). Subsections 8(c) and 8(d), in turn, set forth procedures and restrictions governing removals by reason of changed residence. The Supplemental Process does not use failure to vote only as described in subsections 8(c) and 8(d) and therefore does not satisfy the exception to subsection 8(b)'s prohibition.

1. Subsections 8(c) and 8(d) Permit Consideration of Failure to Vote Only to Confirm a Change in Residence, Not to Identify Registrants Who Have Moved.

Subsection 8(b)'s "except" clause provides that the general prohibition on programs and activities that result in removal by reason of failure to vote does not prohibit "a State from using the procedures described in subsections (c) and (d)." *Id.* By including this specific and narrow exception, Congress made clear that subsection 8(b) prohibits all programs or activities that use failure to vote in a manner not described in subsections 8(c) and 8(d). *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied ...." (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980))). The Supplemental Process's use of failure to vote, however, is consistent with neither of these subsections.

Subsection 8(c) permits states to remove registrants based on changed residence where they obtain evidence of a change of address from the Postal Service *and* then "confirm" it using the subsection 8(d) Confirmation Procedure. 52 U.S.C. § 20507(c)(1)(B)(iii). Ohio does not contend that the Supplemental Process uses the procedure described in subsection 8(c), nor could it: The Supplemental Process uses no Postal Service information.

Subsection 8(d) allows states to consider failure to vote only as part of a carefully specified Confirmation Procedure, *after* a state has grounds for determining that a registrant may be ineligible due to a change in residence,

and *after* the state sends the voter a confirmation notice. The procedure described in subsection 8(d) does not authorize states to treat failure to vote as evidence that the registrant may have moved *before* sending that individual a confirmation notice.

As Petitioner himself concedes, subsection 8(d) is a "Confirmation Procedure." Pet. Br. at 7-8. The statute requires states to use the "procedure described in subsection (d)(2) to *confirm* the change of address" before a registrant may be removed under subsection 8(c). 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added). To "confirm" means "[t]o corroborate, or add support to (a statement, etc.); to make certain, verify, put beyond doubt." Oxford English Dictionary (2d ed. 1989). As a procedure for confirming a change in residence, subsection 8(d) presupposes that a state already has information indicating that the registrant has moved out of the jurisdiction, which it then seeks to "verify" or "corroborate" through subsection 8(d)'s Confirmation Procedure. This understanding of subsection 8(d) is reflected in the NVRA's legislative history. *See* S. Rep. No. 103-6, at 39 ("The bill would permit a state, *if it determines a voter has moved*, to remove the voter from the list *only after* sending a forwardable notice....") (emphasis added); *see also* H.R. Rep. No. 103-9, at 16 (same). Likewise, until its eleventh-hour reversal in this Court, the United States had consistently argued that, as a *confirmation* procedure, subsection 8(d) may be used only when a state has obtained evidence that a voter has moved. *See, e.g.*, U.S. C.A. Br. at 8 ("Without some initial evidence of a change in residence, there would be nothing to confirm.").

Thus, subsection 8(b) prohibits programs that result in removal by reason of failure to vote, but with a limited exception permitting states to consider failure to vote as part of the Confirmation Procedure described in subsection 8(d), after a state has determined that a registrant may be ineligible due to changed residence. The Supplemental Process, by contrast, uses failure to vote not only to confirm a change in residence, but also in order to make the initial determination that a registrant "may have moved," before a notice has ever been sent. Directive 2015-09, R.42-2, PageID#1588. It makes this determination simply because the registrant has chosen not to vote in a single federal election cycle, and then subjects her to a process that requires her to take affirmative measures to remain on the rolls. The Supplemental Process's reliance on failure to vote initially, to *determine* that a voter may have moved, before a notice is mailed, is not authorized by the procedure described in subsection 8(d), and thus does not fall within subsection 8(b)(2)'s exception. It is therefore prohibited by subsection 8(b)(2).

Petitioner argues "[subsection 8(b)] does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure." Pet. Br. at 37. But subsection 8(b) broadly prohibits any list-maintenance "program or activity" that results in a removal by reason of failure to vote except those described in subsections 8(c) and 8(d). 52 U.S.C. § 20507(b). Determining the "classes of registrants to whom States send notices" that may lead directly to removal from the rolls plainly constitutes part of a list-maintenance "program or activity," and is subject to subsection 8(b)'s restrictions unless specifically exempted. For the reasons already stated, because the Supplemental

Process uses failure to vote alone to determine the "classes of registrants to whom [Ohio] send[s] notices," it does not fall within the exception to subsection 8(b)(2), and it is therefore prohibited.

2. The Confirmation Procedure Is a Means of Confirming Changed Residence, Not a Standalone Removal Program.

Petitioner argues that subsection 8(d) authorizes the state to conclude that a registrant has changed residence solely on the basis of the registrant's failure to respond to a notice and failure to vote in the subsequent two federal election cycles, and to remove the person on that basis. Pet. Br. at 7-8. In his view, subsection 8(d) is not a confirmation procedure but a standalone program that can be used to remove registants at any time, for any reason, or for no reason at all—*even when there is no reason to believe the registrant has moved. Id.* at 26 (NVRA "says nothing about who may receive notices under the Confirmation Procedure" and "does not bar States from sending notices to the entire electorate").[17]

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[17] The United States takes the same position, citing a previous, unenacted version of the NVRA to support its reading of the statute. U.S. Br. at 29. But "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969). Moreover, the earlier version did not contain a clause prohibiting removal programs that use failure to vote. In any event, Congress made clear, in both the law it enacted and the bill it did not pass, that the Confirmation Procedure is to be used only to *confirm* a determination that a registrant has moved. *Compare* 52 U.S.C. § 20507(d) ("State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office *on the ground that the registrant has changed residence* unless" the

This view of subsection 8(d) is contrary to the NVRA's text, purpose, and legislative history. Read in the context of Section 8 as a whole, subsection 8(d) can only be understood as a means of *confirming* a change in residence for which a state has obtained some predicate information indicating such a change, and not as an independent mechanism for *establishing*, without more, that a registrant has moved.

Treating the Confirmation Procedure as a standalone procedure for removing registrants is at odds with its role in the Postal Service program set forth in subsection 8(c). *See* 52 U.S.C. § 20507(c)(1). Subsection 8(c) provides that even when the registrant herself has informed the Postal Service that she has a new address, the state must still "confirm" that information using the subsection 8(d) Confirmation Procedure. *Id.* It would make no sense for Congress to demand that states use the Confirmation Procedure when a state has objective evidence of an address change from the Postal Service, while at the same time authorizing a state to use the Confirmation Procedure as a standalone mechanism to *purge* registrants when it does not have *any* evidence of a change in residence whatsoever. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting interpretation of statute that "would produce an absurd and unjust result which Congress could not have intended" (internal citation and quotation marks omitted)).

Allowing states to remove registrants simply by using subsection 8(d)'s notice procedure with no predicate

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Confirmation Procedure is followed) (emphasis added), *with* S.874, 101st Cong., § 6(d) ("State may, if it determines that a registrant may have changed his residence," use the Confirmation Procedure).

change-of-address information is also contrary to Congress's stated intent in enacting the NVRA. While Congress was "mindful of the need to keep accurate and current voter rolls," it expressed "concern[] that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15. Yet under Petitioner's interpretation, a state can remove a registrant who fails to respond to a notice and fails to vote before two federal election cycles elapse, with no evidence whatsoever that the registrant has moved and even when state records show that the individual has *not* moved and remains eligible to vote—as was true of Respondent Harmon. *See* Harmon Decl., R.9-4, ¶ 12 (state tax records would show Respondent Harmon had not changed residence). That is inconsistent with "one of the guiding principles of this legislation," namely "to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19.[18]

It was precisely to put an end to such arbitrary removals that Congress enacted the NVRA and prohibited states from purging eligible registrants. Interpreting subsection 8(d) as Petitioner suggests would allow states to

[18] The United States points to a report by the Congressional Budget Office, which purportedly suggests that the NVRA prohibits states only from dropping non-voters without notice. U.S. Br. at 31. That report is neither legislative history nor authoritative. It was appended to the House and Senate committee reports on the NVRA only as an "estimate of costs" pursuant Congress's internal rules. *See* S. Rep. No. 103-6, at 37; H.R. Rep. No. 103-9, at 21. It does not purport to reflect the views of the enacting legislators on the meaning of the statute's provisions.

remove registrants with no reliable basis for believing they are ineligible, undermining Congress's goal of increasing the number of eligible voters who are registered to vote. A statute should not be interpreted to create a result "that Congress designed the Act to avoid." *King*, 135 S. Ct. at 2493; *see also Postmaster-Gen. of U.S. v. Early*, 25 U.S. 136, 147-48 (1827) (same).

Lastly, Petitioner suggests that the Supplemental Process's reliance on failure to vote is necessary for maintaining accurate voter rolls because using change-of-address information from the Postal Service to identify registrants who may have moved "misses any registrant who moves *without* notifying the postal service." Pet. Br. at 10. But there are many reliable ways to identify registrants who may have moved outside the jurisdiction. The NVRA itself ensures that the "process of updating registration rolls is an ongoing and continuous process," S. Rep. No. 103-6, at 20, by requiring that updating a driver's license "shall serve as [a] change of address for voter registration," 52 U.S.C § 20504(d), and that state public assistance and disability agencies distribute a voter-registration form "with each ... change of address form," *id.* § 20506(a)(6)(A). And the statute also permits states to rely on other sources of information—such as mailings returned as undeliverable, door-to-door canvasses, and interstate sharing of address information from driver's-license and voter-registration lists—to identify voters who may have become ineligible by reason of a change in residence. *See supra* SOC, Part E. There is no need to contort the text of subsections 8(b) and 8(d) to permit using failure to vote to identify voters who may have moved.

II. HAVA CONFIRMS THAT THE SUPPLEMENTAL PROCESS VIOLATES SECTION 8 OF THE NVRA.

Although Petitioner asserts that "HAVA confirms that the NVRA permits Ohio's Supplemental Process," Pet. Br. at 35, the opposite is true. HAVA confirms that the Supplemental Process violates Section 8 of the NVRA. *See* 52 U.S.C. §§ 20507(b)(2), (d)(1); 21083(a)(4)(A).

Petitioner's contention that HAVA "limit[s] the ... scope" of subsection 8(b) of the NVRA, Pet. App. at 21a, is belied by HAVA's text, which states that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to *supersede, restrict, or limit* the application of [the NVRA]." 52 U.S.C. § 21145(a) (emphasis added). HAVA did not change the NVRA's requirements nor expand the reasons by which registrants could be removed from the rolls. Rather, it clarifies that failure to vote may not be used to remove registrants from the rolls.

A. HAVA's Amendment to Subsection 8(b) of the NVRA Clarified, But Did Not Modify, the Statute's Restrictions on List-Maintenance Programs.

HAVA added the provision in subsection 8(b)(2) of the NVRA exempting "the procedures described in subsections (c) and (d)" from subsection 8(b)'s prohibition on list-maintenance programs that "result in the removal of [a registrant] by reason of the person's failure to vote." *Id.* § 20507(b)(2). The amendment was expressly intended to clarify, *not to modify*, the prohibition on removals based

on failure to vote. *See* 116 Stat. 1666, § 903 (section titled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence"). Although subsection 8(d) requires failure to vote to be considered after a notice has been sent—and thus, in a literal sense, "result[s] in the removal" of registrants "by reason of [their] failure to vote," 52 U.S.C. § 20507(b)(2)—the amendment clarifies that this procedure is permissible, notwithstanding subsection 8(b)'s otherwise broad prohibition on list-maintenance programs that rely on failure to vote. The amendment does not exempt any other list-maintenance programs that result in removal by reason of failure to vote.

Petitioner contends that reading the HAVA amendment as a mere clarification of the relationship between (b), (c), and (d) fails to give it "'real and substantial effect.'" Pet. Br. at 35-36 (quoting *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016)). He argues that, to have such effect, the amendment must be construed to limit the scope of subsection 8(b)'s prohibition. Pet. Br. at 40; *but see* 52 U.S.C. § 21145(a) ("nothing in [HAVA] may be construed to ... limit the application of [the NVRA]"). But the "real and substantial effect" of this provision was, as Congress expressly provided, to clarify that the prohibition does not preclude use of failure to vote in accordance with 8(c) and 8(d). *See* 116 Stat. 1666, § 903 (heading).

Had Congress wished to make a substantive change to subsection 8(b)(2), it knew how to do so: HAVA creates one express exception to its savings clause, which otherwise provides that nothing in the statute should be read as superseding the requirements of the NVRA. *See* 52 U.S.C. § 21145(a). The exempted provision, 52 U.S.C. § 21083(b),

amends subsection 6(c) of the NVRA to require that voters who register by mail present identification the first time they vote. *Id.* § 21083(b)(1), (2)(A). Had Congress intended to alter subsection 8(b)(2)'s reach, it could have similarly excluded the amendment to subsection 8(b)(2) from the savings clause. It did not do so. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

B. Section 303 of HAVA Confirms the Limited Permissible Use of Failure to Vote as Part of the Confirmation Procedure.

Section 303 of HAVA further confirms Respondents' reading. Subsection 303(a)(4)(A) mandates specific procedures that states must use to maintain their statewide electronic voter-registration lists. 52 U.S.C. § 21083(a)(4)(A). It then states: "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Id.* While the provision reverses the order of the rule and exception as laid out in subsection 8(b)(2), the effect is the same: Failure to vote cannot be the sole basis for presuming a registrant has moved and subjecting the registrant to the Confirmation Procedure.

Petitioner contends that the use of the word "solely" in HAVA saves the Supplemental Process. According to Petitioner, because the Supplemental Process incorporates the subsection 8(d) Confirmation Procedure to remove registrants due to "fail[ure] to respond to a notice *and* ... fail[ure] to vote," it does not remove registrants "solely" due to a failure to vote. *See* Pet. Br. at 39.

There are several problems with this reading. First, it ignores the words "except that." In order for those words to have any effect, there must be some circumstances in which the removal of a registrant "who ha[s] not responded to a notice and who ha[s] not voted in 2 consecutive general elections for Federal office" would constitute a prohibited removal "solely by reason of a failure to vote." In other words, if, as Petitioner argues, a removal for failure to respond to a notice and failure to vote is categorically not a removal "solely by reason of a failure to vote," there would be no reason for the words "except that" in subsection 303(a)(4)(A). The exception would be no exception at all. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

Second, subsection 303(a)(4)(A) cannot be read, as Petitioner would have it, as a command to states to remove registrants "who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office"—even if there is no evidence that they moved, or indeed, even if the state knows that they have *not* moved. 52 U.S.C. § 21083(a)(4)(A); Pet. Br. at 38-39. That reading would conflict with the NVRA and with other parts of

HAVA. Moreover, while a literal reading of subsection 303(a)(4)(A) would require removal of a registrant who fails to vote in "2 consecutive general elections," NVRA subsection 8(d) provides that a state shall not remove a registrant unless she "has not voted or appeared to vote ... in *an election during the period* beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice." *Id.* § 20507(d)(1)(B)(ii) (emphasis added). Thus, if a registrant votes only in a local election or a federal primary during this period, she could not be removed under the NVRA but would be required to be removed under HAVA.

Moreover, under subsection 8(b) of the NVRA, a state may only remove a registrant from the official list of eligible voters if she "has not voted *or appeared to vote*" in two consecutive federal general elections. 52 U.S.C. § 20507(b) (emphasis added). Thus, a state is prohibited under subsection 8(b) of the NVRA from removing one who "appeared to vote" in a federal election but did not cast a ballot, but, under Petitioner's interpretation, is *required* to remove that same person under subsection 303(a)(4)(A).

Instead of gutting the NVRA and other provisions of HAVA, the "[t]he better reading of Section 21083(a)(4)(A) is that it is an imprecise reference to the requirements set forth in more detail in Section 20507," U.S. Br. at 26, not a modification of them.

As this Court has stated repeatedly, statutes must be read "in their context and with a view to their place in the overall statutory scheme." *King*, 135 S. Ct. at 2489 (internal quotation marks omitted); *see also Richards*

v. United States, 369 U.S. 1, 11 (1962) (stating that it is "fundamental" in interpreting legislation "that a section of a statute should not be read in isolation from the context of the whole Act"). When subsection 303(a)(4)(A)'s "except" clause is read in context and "consistent with the [NVRA]," its use of the word "solely" simply underscores that failure to vote alone cannot serve to determine a change in residence that the state seeks to confirm using the subsection 8(d) Confirmation Procedure. Rather, "consistent with the [NVRA,]" before using subsection 8(d) to confirm a change in residence, states must have some basis beyond a registrant's failure to vote for believing that she has moved.

C. HAVA's Legislative History Does Not Support Petitioner's Interpretation.

Petitioner and the United States place great weight on selected reports to the states and Congress by the FEC, attempting to use the reports to establish what HAVA's plain language does not—namely, that Congress intended to permit states to use the subsection 8(d) Confirmation Procedure as a standalone program, untethered from Section 8's other limitations. *See* Pet. Br. at 36-38.

But while Petitioner and the United States cite FEC reports that pre-date HAVA's enactment by four years (or more)—and are not part of the legislative record, they ignore the FEC's conclusions in its report to the very Congress that enacted HAVA. In its report on the NVRA to the 107th Congress, the FEC observed that voter lists must "be positively verified rather than passively purged for failure to vote," and identified "two ways to accomplish this task: either running the entire voter list against

the Postal Service's computerized National Change of Address files (NCOA), or else mailing *non-forwardable notices* to everyone on the voter registry," and using any mail returned as undeliverable as evidence of a change in residence. Fed. Election Comm'n, *A Rep. to the 107th Cong.: The Impact of the Nat'l Voter Registration Act of 1993 on the Admin. of Elections for Fed. Office 1999-2000*, at 15 (June 30, 2001) (emphasis added). This was the FEC's understanding of the NVRA's list-maintenance requirements as reported to the enacting Congress; HAVA was introduced just months later, and Congress expressly provided that HAVA made no change to the NVRA's list-maintenance provisions.

In any event, the reports relied upon by Petitioner and the United States simply gathered factual information regarding state practices surrounding the NVRA. One of them also expressly cautioned readers, "It is very important to note ... that the [FEC] does not have legal authority either to interpret the Act or to determine whether this or that procedure meets the requirements of the Act." *Implementing the Nat'l Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples*, R.38-17, at PageID#1114. And the agency that *is* tasked with NVRA enforcement, DOJ, consistently interpreted Section 8 to prohibit purge processes such as Ohio's Supplemental Process—until its sudden reversal in its brief before this Court.

Nevertheless, Petitioner insists that his cherry-picked FEC reports signify that Congress, in enacting HAVA, sought to resolve a "debate" between DOJ and certain states by siding with the outlier states that used subsection 8(d)'s Confirmation Procedure based on a

registrant's failure to vote. Pet. Br. at 36. Petitioner cites not a single mention of such a debate between DOJ and the states in HAVA's legislative history, much less anything from which to conclude that Congress resolved it in favor of particular states and against the position of the agency charged with NVRA enforcement. Rather, as it relates to the NVRA, HAVA's legislative history has a singular bottom line: HAVA does not "undermine [the NVRA] in any way," and the NVRA's procedures to "guard against removal of eligible registrants remain in effect." H.R. Rep. No. 107-730, at 81 (Conf. Rep.); *cf. Weinberger v. Rossi*, 456 U.S. 25, 32-34 (1982) (refusing to read statute contrary to concerns legislators sought to address and in favor of a goal that was not a concern of Congress).[19]

III. NONE OF PETITIONER'S "CANONS OF CONSTRUCTION" PROVIDE A BASIS TO DEFER TO OHIO'S INTERPRETATION OF THE NVRA.

A. The NVRA's Regulation of Registration Procedures Is Authorized by the Elections Clause, and Presents No Constitutional Concerns.

Petitioner argues that "[t]he canon of constitutional avoidance directs the Court to adopt a narrow reading" of the NVRA. Pet. Br. at 17. But "[s]tatutes should be interpreted to avoid *serious* constitutional doubts, not to

[19] The United States also cites a few single member statements. U.S. Br. at 27. But it is axiomatic that "the views of a single legislator ... are not controlling." *Mims v. Arrow Fin. Servs.*, 565 U.S. 368, 385 (2012). In any event, the statements do not compel an alternative interpretation of the relationship between HAVA and Section 8 of the NVRA.

eliminate all possible contentions that the statute might be unconstitutional." *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (internal citation omitted, emphasis in original). The canon has no applicability here, where no serious constitutional issue is raised.

As this Court recently reaffirmed, Congress's authority under the Elections Clause to regulate the "Times, Places, and Manner" of federal elections is "comprehensive," and encompasses the regulation of "registration." *ITCA*, 133 S. Ct. at 2253 (citing *Smiley*, 285 U.S. at 366). Petitioner incorrectly states that this Court "expressly reserved th[e] question" of whether the Elections Clause permits Congress to regulate voter registration, *see* Pet. Br. at 51-52. *ITCA* held that the NVRA properly requires states to register voters who use the federal voter-registration form approved by the Election Assistance Commission. *ITCA*, 133 S. Ct. at 2257. In so ruling, the Court necessarily found that Congress had the authority to set rules for voter registration. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

While *ITCA* conclusively held that Congress may regulate registration, it did reserve the question whether the *particular registration rule* in that case might infringe on a state's authority under the Qualifications Clause to enforce its voter qualifications. *See ITCA*, 133 S. Ct. at 2259. Petitioner suggests that interpreting Section 8 to prohibit the Supplemental Process raises three possible constitutional concerns. None of these is well founded.

First, Petitioner asserts that "Ohio's Supplemental Process at least enforces its power to prescribe a residency qualification." Pet. Br. at 49. To be sure, states may require that voters be residents of the jurisdiction in which they are voting. But Section 8's prohibition on list-maintenance programs that result in the removal of a registrant by reason of her failure to vote does not disturb that unexceptional observation.

In *ITCA*, the Court noted that a registration regulation that "precluded a State from obtaining the information *necessary* to enforce its voter qualifications" could potentially interfere with a state's authority under the Qualifications Clause. *ITCA*, 133 S. Ct. at 2258-59 (emphasis added). That does not mean, as Petitioner suggests, that Congress cannot regulate a registration procedure merely because it is a state's "preferred method" of enforcing its qualifications, Pet. Br. at 50. Under Petitioner's logic, a state's bare assertion that a given registration procedure is necessary to enforce its voter qualifications would be sufficient to override the NVRA. That "would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *ITCA*, 133 S. Ct. at 2256 (quoting 52 U.S.C. § 20501(b)(1)).

Prohibiting the Supplemental Process in no way prevents Ohio "from obtaining the information necessary to enforce its voter qualifications," and therefore does not raise a constitutional question. *ITCA*, 133 S. Ct. at 2258-59. As explained above, the NVRA leaves many more reliable mechanisms in place for removing registrants who have become ineligible due to changed residence outside the jurisdiction. *See supra* SOC, Part E.

Nor does prohibiting the Supplemental Process preclude Ohio from "requiring voters to confirm their eligibility" as Petitioner contends, *see* Pet. Br. at 50. Indeed, as Petitioner recognizes, the registration process itself was adopted to require eligible citizens to confirm their qualifications in advance of an election, *id.* at 2-3, and there is no dispute that registrants removed under the Supplemental Process have all previously affirmed their eligibility by registering to vote. Moreover, the NVRA permits states to require registrants to reaffirm their residency at the polling place before voting if there is a basis to question the registrant's continued residency in the jurisdiction. 52 U.S.C. § 20507(d)(2)(A) ("If the [8(d)(2) confirmation] card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election.").

Second, Petitioner suggests that registration itself "might" be a qualification, Pet. Br. at 51, citing an 1890 Indiana Supreme Court decision. *Id.* at 53 (citation omitted). But, the possibility that registration "might" be a qualification somewhere other than Ohio is hardly sufficient to trigger the canon of constitutional avoidance in this case. Finally, even if registration were a qualification, there is no question that the registrants improperly removed as a result of the Supplemental Process *were* registered and satisfied all of Ohio's qualifications to vote.

Third, Petitioner suggests that insofar as the NVRA governs registration to vote in presidential elections, it exceeds Congress's authority under the Elections Clause, which extends only to congressional elections. Pet. Br. at 53. This case, however, encompasses a challenge to the

Supplemental Process as used in congressional elections. A ruling on whether Section 8 can also govern presidential elections therefore would have no bearing on the outcome of this case, and the issue therefore is not properly presented for decision, nor was it raised below.

B. Applying the NVRA to Bar the Supplemental Process Does Not Trigger the Clear-Statement Rule or Raise Other Federalism Concerns.

Petitioner argues that "[t]he clear-statement rule also directs the Court to uphold Ohio's Supplemental Process." Pet. Br. at 18. That rule has no application in this case. The clear-statement rule applies only where "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government[.]'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). With respect to regulation of federal elections, however, the Elections Clause has already set the constitutional balance decisively in favor of Congress.

Congressional legislation pursuant to the Elections Clause therefore does not "alter" the existing constitutional balance in any way. Rather, it is well established that whenever Congress legislates under the Elections Clause "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *ITCA*, 133 S. Ct. at 2257. As such, there is no presumption against pre-emption in assessing Elections Clause legislation. *Id.* at 2256-57. And because the clear-statement rule is "based on the presumption against pre-emption," *Gonzales v. Oregon*, 546 U.S. 243, 291 (2006) (Scalia, J., dissenting), it has no application here.

Petitioner cites *Ex parte Siebold*, 100 U.S. 371 (1879), as requiring application of the clear-statement rule in the Elections Clause context. Pet. Br. at 55. *Siebold* did nothing of the sort; to the contrary, like *ITCA*, it recognized that an exercise of Congress's Elections Clause authority would necessarily displace state law, and it presumed that Congress had "endeavored to guard as far as possible against any unnecessary interference with State laws." *Siebold*, 100 U.S. at 393.

Petitioner also invokes the canon that Congress does not hide elephants in mouseholes. Pet. Br. at 27. This canon applies not to Congress's exercise of its *own* constitutionally conferred authority, but instead to delegation of agency power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). And, even if this canon were applicable outside the regulatory context, it would not assist Petitioner. There was nothing hidden about Congress's intent to displace state voter-registration regulations in enacting the NVRA. *See* S. Rep. No. 103-6, at 2-4 (noting Congress was exercising its authority to "establish[] national voter registration procedures" and displace "restrictive" voter-registration practices). At bottom, this argument is simply another back-door effort to impose a clear-statement rule where none applies.

Finally, Petitioner argues that applying the plain text of the NVRA to prohibit the Supplemental Process would impose a "one-size-fits-all" method for list

maintenance and thus disturb the important role of states as laboratories of democracy. But the NVRA does not mandate a single method for maintaining accurate voting lists. *See supra* SOC, Part E. On the contrary, the NVRA offers substantial flexibility as to what sources of information states may use to identify registrants who have become ineligible due to changed residence. But it prohibits the specific process used by Ohio, because it results in removal of eligible registrants by reason of a failure to vote.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE,
NORTHEAST OHIO COALITION FOR THE HOMELESS,
AND LARRY HARMON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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52 U.S.C. § 20507(d)(1)(B)(ii) 6, 10

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52 U.S.C. § 21083(a)(2)(A)(ii) 17

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52 U.S.C. § 21145(a) 15

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National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77 ..... *passim*

State

Ohio Const. art. V, § 1 21

Other Authorities

FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 106th Congress* (June 30, 1999) 18

FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 107th Congress* (June 30, 2001) 18

H.R. Rep. No. 103-9 (1993) 6

Hearing Before the Comm. on the Judiciary on H.R. 3295, 107th Cong., 1st Sess. (2001) 19

Mark Up of H.R. 3295, The Help America Vote Act of 2001: Mark Up Before the Comm. on H. Admin., 107th Cong., 1st Sess. (2001) 19

McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs (2005) 5

Random House Dictionary of the English Language (1987) 18

S. Rep. No. 103-6 (1993) 6, 7, 11

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 9, 11

1 Joseph Story, *Commentaries on the Constitution of the United States* (1833) 20

Ohio Secretaries of State from both political parties have long verified Ohio's rolls through a Supplemental Process that sends notices to persons without voter activity over two years, and removes them if they fail to respond or to vote for four more. Secretary Husted's opening brief showed why this process comports with the "Failure-To-Vote Clause" in the National Voter Registration Act (NVRA), 52 U.S.C. § 20507(b)(2). *First*, the clause must be interpreted harmoniously with the "Confirmation Procedure," which requires States to use nonvoting in removal. *Id.* § 20507(d)(1)(B). Thus, the failure to respond to a notice under the Confirmation Procedure should be read to break the prohibited link between nonvoting and removal under the Failure-To-Vote Clause. *Second*, the "Clarifying Amendment" in the Help America Vote Act (HAVA) explained that the clause cannot be "construed" to bar States from removing persons through the Confirmation Procedure. *Id.* § 20507(b)(2). The clause instead bars removals "solely" for nonvoting. *See id.* § 21083(a)(4)(A). *Third*, if any remaining doubt existed, canons of construction would suggest the reading that intrudes less on traditional state functions.

Respondents' contrary reading conflicts with the plain text and balanced purposes of the NVRA and HAVA. They *add* text to the NVRA by claiming that States may not send notices under the Confirmation Procedure unless they have "predicate information" that registrants have moved. Resp. Br. 41. And they *subtract* text from HAVA by claiming that the Failure-To-Vote Clause bars the Supplemental Process even though that process does not remove anyone "solely" for nonvoting. *Id.* at 49. Respondents justify these changes by reciting certain NVRA goals—such

as increasing registration or avoiding penalizing nonvoters. *Id.* at 30. Yet the NVRA serves *dueling* purposes, including keeping voter lists current. And Congress pursued the goals that Respondents highlight in a narrower fashion—by expanding registration, 52 U.S.C. §§ 20504-20506, and requiring notices before removals, *id.* § 20507(d). It did not go further because of fraud concerns with outdated lists. *Id.* § 20501(b)(3)-(4). This Court must enforce the careful compromise that Congress reached, not the lopsided legislation that Respondents prefer. After all, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), and the judiciary must "apply, not amend, the work of the People's representatives," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

I. Respondents Fail To Show That The Original NVRA Barred Ohio's Process

As the Secretary noted (at 19-35), the original NVRA permitted the Supplemental Process. Respondents' contrary reading lacks merit.

A. Respondents' Claim That Ohio's Process Violates § 20507(a)(3) Misreads The Text

Respondents argue that the Supplemental Process violates § 20507(a)(3) because it removes individuals for a *ground* (failing to respond to a notice and to vote for six years) that is not one of the grounds for removal identified in that provision. Resp. Br. 25-26. This argument invokes reasoning that the Sixth Circuit did not accept at the expense of reasoning that it did employ.

The Sixth Circuit correctly did not adopt this argument. Section 20507(a)(3) identifies only *grounds*

for which States may remove registrants (criminal conviction, mental incapacity, death, or changed residence); the provision does not regulate the *evidence* that States may use to find those grounds met. Other subsections—such as the Failure-To-Vote Clause or Confirmation Procedure—address that evidence. Section 20507(a)(3)'s text makes this plain. It notes that States may not remove registrants except "as provided under paragraph (4)," which tells States to remove registrants for changed residence "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(3)(C), (a)(4)(B). If a process comports with those subsections, therefore, it necessarily satisfies § 20507(a)(3). And here, the Supplemental Process uses a failure to respond to a notice and to vote for six years as *evidence* of changed residence. Brunner Directive 2009-05, R.38-7, PageID#401. The real question thus remains: Does the Supplemental Process remove persons for a listed ground (changed residence) in a way that adheres to the Failure-To-Vote Clause and Confirmation Procedure? The process does so for the reasons described below.

Respondents' argument also undercuts one of the Sixth Circuit's main justifications. That court gave the Failure-To-Vote Clause a broad sweep to prevent its alleged superfluity, noting that the Confirmation Procedure already required States to follow its steps. Pet. App. 17a-18a. But, as the Secretary indicated (at 32-35), the clause retains independent meaning under his reading just as much as under the court's. It regulates *all* programs, not just those based on *changed address*, and so reaches programs designed to identify wrongly registered persons (such as noncitizens). Respondents now concede that § 20507(a)(3) does *not* provide the exclusive grounds

for removal, and that States may remove persons who were ineligible when they were added to the rolls. Resp. Br. 26. Thus, they barely invoke the Sixth Circuit's superfluity rationale, as the logic in their (mistaken) § 20507(a)(3) argument precludes it.

B. Respondents' Reading Of The NVRA Creates A Conflict Within The Statute, And Adds An Atextual Element To It

The Secretary explained (at 19-29) that the Supplemental Process does not violate the Failure-To-Vote Clause for two reasons. *First*, while the Failure-To-Vote Clause bars programs that result in removal by reason of nonvoting, the Confirmation Procedure affirmatively requires programs to use nonvoting in removal. The Court can reconcile these provisions by holding that the failure to respond to a notice under the Confirmation Procedure breaks the prohibited link between nonvoting and removal under the Failure-To-Vote Clause. *Second*, the Confirmation Procedure places no limits on the persons to whom a State may send notices. The Court should read that silence as a delegation to the States to choose their notice "triggers," not to the courts to designate triggers in common-law fashion. Respondents' contrary view (1) reads the Failure-To-Vote Clause as conflicting with the Confirmation Procedure, and (2) hinges on an implied limit on sending notices.

1. Respondents do not reconcile the NVRA's provisions

Respondents assert that the Failure-To-Vote Clause bars *any* maintenance program that uses nonvoting in any way. Resp. Br. 27-43. Their arguments do not justify their expansive reading.

a. "*Result In.*" Respondents begin with the wrong definition of "result." They argue that "[a] thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process or design.'" Resp. Br. 27 (quoting *Burrage v. United States*, 134 S. Ct. 881, 887 (2014)). But *Burrage* interpreted the phrase "result from" (in which the subject is the effect), not "result in" (in which the subject is the cause). As the Secretary noted (at 20, 30-31), "result in" means to "cause," which signals that the clause contains causation concepts. *McGraw-Hill's Dictionary of Am. Idioms and Phrasal Verbs* 560 (2005).

Respondents also get nowhere by noting that the Failure-To-Vote Clause's text ("result in . . . removal . . . by reason of") covers more than § 20507(a)(4)'s text ("remove . . . by reason of"). Resp. Br. 27-28. All agree that the Failure-To-Vote Clause does not just bar removing persons on the *ground of nonvoting*; it also bars some evidentiary uses of nonvoting to conclude that individuals are ineligible on *other grounds* (such as using nonvoting alone to conclude that registrants have died). The question here is how far that evidentiary restriction extends—to *all* uses of nonvoting no matter how remote from removal, or *only* uses that make nonvoting the proximate cause of removal. The phrases "result in" and "by reason of"—combined with the Confirmation Procedure's required use of nonvoting—point to the latter view.

b. "*Removal.*" Respondents contend that Ohio violates the Failure-To-Vote Clause by "subject[ing] registrants to the Supplemental Process"—i.e., sending notices—"based solely on their failure to vote . . . ." Resp. Br. 28-31. This reading conflicts with the statute's text, legislative history, and purposes.

Start with text: Respondents disregard the object within the Failure-To-Vote Clause. The clause bars programs that result in *removal* for nonvoting; it does not bar programs that result in *sending notices* for nonvoting. And the Supplemental Process does not treat nonvoting in one election as the "equivalent" of a move that justifies removal. Resp. Br. 29. Instead, the process requires six years of nonvoting *and* a failure to return a postage-prepaid notice asking recipients to confirm their eligibility.

Turn to legislative history: Respondents claim that a Senate Report described a right not to vote and suggested that using nonvoting as evidence of changed residence or death could reach eligible registrants. Resp. Br. 30. Yet their takeaway from this report—that Congress barred *all* uses of nonvoting—conflicts with the statute's *required* use of nonvoting. 52 U.S.C. § 20507(d)(1)(B)(ii). Instead, the report detailed a narrower concern with using nonvoting alone from one election, noting that "many States continue to penalize such non-voters by removing their names from the voter registration rolls *merely* because they have failed to cast a ballot *in a recent election*." S. Rep. No. 103-6, at 17 (1993) (emphases added). The NVRA remedied that concern by requiring *both* nonresponse to a notice *and* nonvoting across two elections. Statements in the Senate and House Reports thus suggested that the Failure-To-Vote Clause would bar *only* programs using nonvoting alone. S. Rep. No. 103-6, at 46; H.R. Rep. No. 103-9, at 30-31 (1993). Respondents reject these statements because they were made by the Congressional Budget Office. Resp. Br. 42 n.18. Yet "the report of the Congressional Budget Office, included in the Senate [and House] Report[s], expressly called Congress' atten-

tion" to this interpretation, so the Court can "assume" that legislators were "in full awareness" of it. *Cf. Heckler v. Turner*, 470 U.S. 184, 206-07 (1985).

No better is Respondents' reliance on the NVRA's purposes. Resp. Br. 30. "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Congress could have banished *any* use of nonvoting from maintenance efforts. But it adopted a balanced approach: "An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis." S. Rep. No. 103-6, at 18. Respondents wrongly use the NVRA's purposes to trump the means by which its text achieved them—by requiring States to send notices and wait four years before removals. 52 U.S.C. § 20507(d)(1)(B).

Respondents thus end with pure policy, claiming that the Supplemental Process is not "reliable." Resp. Br. 30-31. But Congress *itself* decided what counts as sufficiently "reliable" evidence for a changed residence—a failure to return a notice and to vote for four years. The Supplemental Process's six years of nonvoting thus requires *more* evidence than Congress deemed sufficient. And, as the Secretary noted (at 26), it would be odd for the NVRA to prohibit programs that rely on *six* years of nonvoting, but allow statewide canvasses to the entire electorate that rely on only *four*. (Respondents later argue that such a canvass would violate a different element that

they impute to the Confirmation Procedure, but that argument further flouts the text. *See* Part I.B.2.)

c. *"By Reason Of."* Respondents claim that the Failure-To-Vote Clause contains no proximate-clause element. Resp. Br. 31-36. They assert that such an element would conflict with the "result in" phrase. *Id.* at 31. That phrase comports with causation concepts. In fact, the case that Respondents cite left open the possibility that "result from" might include proximate cause. *Burrage*, 134 S. Ct. at 887-88. Here, moreover, Congress combined "result in" with a phrase ("by reason of") that many cases have read to require proximate cause. *E.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267-68 (1992).

Respondents distinguish these cases as addressing "statutory claims that sound in tort." Resp. Br. 32-33. True, this Court usually uses causation principles for statutory claims. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). But Respondents identify *no* case limiting their use to that context. And they ignore cases cited by the Secretary (at 21-22) adopting them elsewhere. The Court, for example, read the National Environmental Policy Act to include an element like the "'familiar doctrine of proximate cause from tort law.'" *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted); *cf. Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986) (noting that the *Gingles* test protects against vote dilution "'proximately caused by the districting plan'" (citation omitted)). Here, "Congress' intent" requires proximate cause because that concept reconciles the Failure-To-Vote Clause's restrictions with the Confirmation Procedure's requirements. *DOT*, 541 U.S. at 767-68.

Indeed, Respondents do not try to reconcile their reading of the Failure-To-Vote Clause—that it bans *all* use of nonvoting—with the Confirmation Procedure's *required* use of nonvoting. They say that the Court need not give the clause a "cramped reading" to reconcile those provisions because of HAVA's Clarifying Amendment. Resp. Br. 36. That amendment allegedly clarified that the clause bars *all* procedures using nonvoting "'except . . . the procedures described in subsections (c) and (d).'" *Id.* (quoting 52 U.S.C. § 20507(b)(2)). As detailed below, Part II.A, this disregards the amendment's text.

More fundamentally, Respondents' reliance on the *later HAVA* to reconcile these provisions confirms that they treat the *original NVRA* as barring (in the Failure-To-Vote Clause) what it allows (in the Confirmation Procedure). That departs from bedrock principles, including the need to interpret a provision in light of the "larger statutory landscape." *Henson*, 137 S. Ct. at 1722. One clause should not be read to prohibit what another clause was "designed to allow." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994). The "harmonious-reading canon" instead directs the Court to give the Failure-To-Vote Clause an interpretation that permits the Confirmation Procedure. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

Respondents' alternative proximate-cause test fails for similar reasons. Resp. Br. 34-35. Claiming that the Failure-To-Vote Clause adopts a foreseeability test, they argue that some registrants foreseeably will not respond to notices. *Id.* at 34. Yet foreseeability has never been the singular proximate-cause test; the doctrine has long required a "direct relationship" between an effect and a cause. *Hemi Grp.*,

LLC v. City of New York, 559 U.S. 1, 12 (2010). Here, the Supplemental Process's initial use of non-voting is an "indirect" cause of removal given that a person must fail to respond to a notice. *Id.* at 10.

Further, proximate cause is a "flexible concept," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008), that depends on the statute, *DOT*, 541 U.S. at 767. If, as Respondents claim, individuals foreseeably will disregard notices, their test does *not* serve proximate cause's function—to reconcile the Confirmation Procedure with the Failure-To-Vote Clause. Treating the failure to respond to a notice as the "sole proximate cause," by contrast, fits the NVRA because it squares these provisions. *Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996). Respondents counter that injuries can have more than one proximate cause. Resp. Br. 34-35. Yet, as the Secretary noted (at 24-26), contributory negligence (i.e., a failure to meet a duty) was long treated as the sole proximate cause. And the NVRA's text rebuts Respondents' claim that the statute relieves individuals of all registration "responsib[ilities]." Resp. Br. 35. It places a modest duty on them—to return a postage-prepaid, preaddressed card asking them to confirm their address. 52 U.S.C. § 20507(d)(1)(B), (d)(2).

2. Respondents add an element to the Confirmation Procedure

Recognizing that sending notices to the entire electorate cannot violate the *Failure-To-Vote Clause*, Respondents claim that this statewide canvass violates the *Confirmation Procedure*. Resp. Br. 37-43. But they identify nothing in the Confirmation Procedure's two elements that limits who may receive notices. 52 U.S.C. § 20507(d)(1)(B)(i)-(ii). Instead, they

discover in the penumbra between (d)(1)(B) and (d)(1)(B)(i) an initial, implicit element: that States must have "grounds for determining that a registrant may be ineligible due to a change in residence" before sending notices. Resp. Br. 37. Respondents create this element from whole cloth. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." Scalia & Garner, *supra*, at 93. As Justice Brandeis recognized, *Iselin v. United States*, 270 U.S. 245, 251 (1926), Respondents' requested "gap-filling ultimately comes down to the assertion of an inherent judicial power to write the law," Scalia & Garner, *supra*, at 95.

Respondents' arguments do not justify their gap-filling. *First*, they cite the Secretary's use of "Confirmation Procedure" to describe § 20507(d)(1)(B), and assert that the word *confirm* "presupposes that a state already has information indicating that the registrant has moved out of the jurisdiction, which it then seeks to 'verify' or 'corroborate' through" the two-step procedure. Resp. Br. 38. Yet the Confirmation Procedure's notices need not verify that persons have moved to a *different* address; they can verify that persons remain at the *same* one. That is, these notices confirm the rolls. S. Rep. No. 103-6, at 2 (noting that "[t]he bill would not require a specific mandatory procedure for verifying or confirming voter rolls, but would establish standards for any such procedure a State might employ").

That is how the NVRA uses the word "confirmation" when describing the notices. It states that a notice must explain that, "[i]f the card is not returned, affirmation or *confirmation* of the registrant's address may be required before the registrant is permitted to vote" after the notice is sent. 52

U.S.C. § 20507(d)(2)(A) (emphasis added). Persons sent notices thus "confirm" their eligibility with a response or at the polls. Ohio's notice uses the word in the same way, directing registrants to "confirm" that their address remains the same or to "update" it. Notice, Doc. 38-19, PageID#1365.

Second, Respondents note that the "Safe-Harbor Provision"—the subsection using the postal service's change-of-address database—tells States to "use[] the notice procedure described in subsection (d)(2) to confirm the change of address" of individuals in the database. *Id.* § 20507(c)(1)(B)(ii). Because that provision uses the Confirmation Procedure to "confirm" predicate information, Respondents argue, *any* program that uses the Confirmation Procedure must send notices to confirm predicate information. Resp. Br. 41. This argument misreads the Safe-Harbor Provision's text and purpose.

As for its text, the subsection provides an option, not a command. The NVRA compels States to make a "reasonable effort" to remove names of individuals who have moved. 52 U.S.C. § 20507(a)(4) ("Maintenance Duty"). The Safe-Harbor Provision provides one way that States "may" meet this duty by sending notices *only* to the subset of registrants identified in the database. *Id.* § 20507(c)(1).

As for its purpose, Respondents flip the Safe-Harbor Provision on its head by suggesting that it sets a *ceiling* on maintenance efforts. The provision represents a safe harbor for States to meet the duty *to keep up-to-date rolls*. While States need not undertake that specific program, they *must* undertake an equivalent program or risk lawsuits from the DOJ or private parties. Thus, the Safe-Harbor Provision

(or that equivalent) represents the NVRA's *minimum* maintenance effort. Respondents paradoxically read the Safe-Harbor Provision (or that equivalent) as representing the *maximum* effort. The Court should not read a safe harbor for States to satisfy their explicit *duty* to maintain the rolls as creating an implied *restriction* on their ability to maintain the rolls.

Third, Respondents claim that the NVRA would be "'absurd'" if it allowed the removal of those who did not respond to a notice and vote for four years. Resp. Br. 41 (citation omitted). Respecting federalism is not "absurd." As the Secretary noted (at 27-29), most States used nonvoting as a trigger for sending notices before the NVRA. If Congress intended to bar States from *sending notices* based on nonvoting, it would have done so through an express ban, not through an implied restriction. While Respondents argue that this "elephant-in-mouseholes" canon applies only to interpreting congressional "delegation of agency power," Resp. Br. 56, a case from last term refutes their claim. Because the Bankruptcy Code's priority system "has long been considered fundamental," the Court refused to find a "major departure" from it in "statutory silence." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017). Here, however, Respondents discover in the "statutory silence" about who may receive notices a broad ban on sending those notices—one that would constitute a drastic departure from preexisting state practices.

II. Respondents Disregard HAVA's Text And Give It An Implausible Purpose

Respondents cannot rebut the Secretary's showing (at 35-45) that HAVA clarified the NVRA in a way that permits the Supplemental Process.

A. Respondents Misread HAVA's Clarifying Amendment

As the Secretary noted (at 35-38, 40-44), the Clarifying Amendment clarified that the Failure-To-Vote Clause permits processes incorporating the Confirmation Procedure. In response, Respondents misread both the amendment and the Secretary's interpretation of it.

1. Respondents argue that the amendment adopted a "narrow exception" to the Failure-To-Vote Clause, Resp. Br. 37, by reading the clause as barring all procedures that remove registrants for nonvoting "'except . . . the procedures described in subsections (c) and (d),'" *id.* at 36 (citation omitted). This argument has two problems. For one, Respondents edit the Clarifying Amendment's text. Congress did not draft it "as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). Rather, Congress drafted the amendment as a rule of interpretation—directing courts to "construe[]" the Failure-To-Vote Clause in a manner that permits the Confirmation Procedure. Respondents do not attempt to do so; instead, they use ellipses to transform this clarification into an exception.

For another, the Supplemental Process would come within the Clarifying Amendment even if the amendment were viewed as an exception. Respondents claim that the amendment protects only the Confirmation Procedure's use of nonvoting *after* a notice, not the Supplemental Process's initial use of nonvoting *beforehand*. Resp. Br. 39, 44-45. That is not how the amendment reads. The Supplemental

Process "us[es] the procedures described in subsection [] . . . (d) to remove" individuals from the rolls. 52 U.S.C. § 20507(b)(2). The Failure-To-Vote Clause thus cannot "be construed" to bar it. *Id.* In short, just as the Safe-Harbor Provision creates a safe harbor for States to meet their Maintenance Duty, so too the Clarifying Amendment illustrates that the Confirmation Procedure creates a safe harbor for States to comport with the Failure-To-Vote Clause. These symmetrical safe harbors give States "play in the joints" in which to implement the NVRA's competing mandates without risking lawsuits from either side.

2. Respondents wrongly claim that the Secretary interprets the Clarifying Amendment as *changing* the Failure-To-Vote Clause's scope. Resp. Br. 44-45. Not so. Under the Secretary's view, the amendment clarified that the States—not the DOJ—properly read the NVRA to permit sending notices to nonvoters. It "correct[ed] the [DOJ's] error, thus clarifying the original meaning of the section." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988). Under Respondents' view, the amendment clarified only that the Failure-To-Vote Clause permitted the Confirmation Procedure's specific use of nonvoting. They identify nothing predating HAVA suggesting why this "clarification" would have been necessary. Giving the amendment such an implausibly narrow purpose deprives it of "'real and substantial [clarifying] effect.'" *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1588 (2016) (citation omitted).

HAVA's "savings clause" also does not help Respondents. Resp. Br. 45-46. It notes that, with one exception, HAVA does not "supersede, restrict, or limit the application" of the NVRA. 52 U.S.C. § 21145(a). Unlike the exception listed in the sav-

ings clause, which *newly limited* the NVRA's use of mail registration, *id.* § 21083(b)(2)(A), the Clarifying Amendment clarified the Failure-To-Vote Clause's *originally limited* domain.

B. Respondents Rewrite HAVA's Section On Statewide Voter Lists

The Secretary showed (at 38-39, 44-45) that his view followed from the HAVA subsection requiring a "system of file maintenance" for statewide voter lists. 52 U.S.C. § 21083(a)(4)(A). That subsection noted: "Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Id.* This provision required list-maintenance systems to remove certain registrants, but clarified that States could not remove others solely for nonvoting.

In response, Respondents read the "solely" clause to mean that nonvoting "cannot be the sole basis" for "subjecting [a] registrant to the Confirmation Procedure." Resp. Br. 46. Yet the clause states that nonvoting cannot be the sole basis for *removal*; it says nothing about *invoking the Confirmation Procedure.* Respondents support their rewrite with the rule against superfluity, arguing that the clause begins with "except that" and is an exception to the previous clause mandating the removal of those who do not respond to notices. *Id.* at 47. They ignore the Secretary's response (at 45) to this point. The rule against superfluity cannot permit this unnatural departure from the clause's unambiguous meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Re-

gardless, the Secretary's reading gives meaning to all of the text. The sentence "explains how" a maintenance system "must operate." *Colón-Marrero v. Vélez*, 813 F.3d 1, 11 (1st Cir. 2016). That system *must* remove persons who do not respond to a notice and do not vote over four years, but *cannot* remove persons solely for nonvoting. The "solely" clause thus creates an exception from the permissible "system[s] of file maintenance." 52 U.S.C. § 21083(a)(4)(A).

Respondents next ignore the word "shall." Even though this subsection notes that registrants who have not responded to a notice and not voted in two elections "shall be removed," *id.*, Respondents claim that it *cannot* be read "as a command," Resp. Br. 47. That is wrong. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement," especially when a "statute distinguishes between 'may' and 'shall.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *cf.* 52 U.S.C. § 21081(a)(1)(B). This new obligation is also "consistent with the [NVRA]." *Id.* § 21083(a)(4)(A). Nearby HAVA provisions adopted further maintenance obligations, such as using criminal or death records. *Id.* § 21083(a)(2)(A)(ii).

Respondents treat "shall" as "may" on the ground that this subsection contemplates removals of those who have not voted *only* "in 2 consecutive general elections," *id.* § 21083(a)(4)(A), which allegedly conflicts with the Confirmation Procedure's ban on removals unless registrants have failed to vote during *any* election over that time. Resp. Br. 47-48. Changing "shall" to "may" would not fix this purported conflict (since the sentence would still *permit* what the Confirmation Procedure *prohibits*). Instead, "in 2 consecutive general elections" can be read "consistent

with the [NVRA]" as shorthand for the Confirmation Procedure's detailed rules (analogous to *within* two elections). *Cf.* Random House Dictionary of the English Language 964 (1987) (noting that "in" can indicate "inclusion within or occurrence during a period or limit of time").

C. Respondents Interpret HAVA To Serve An Implausible Purpose

As the Secretary noted (at 35-38), States long debated the DOJ over whether they could send notices to nonvoters before HAVA. One FEC report even told Congress that a State suggested "clarifying" the NVRA to permit the practice. FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 106th Congress*, at 19 (June 30, 1999). That backdrop clarifies any ambiguity.

Respondents counter by citing the next FEC report to the Congress that passed HAVA. That report allegedly expressed the FEC's view that the NVRA permitted States to maintain the rolls only with the postal service's database or a nonforwardable mailing to the entire electorate. Resp. Br. 50. As Respondents concede, however, the FEC had *no* authority to interpret the NVRA. *Id.* The report is instead useful because it, too, told Congress that a State recommended "allowing confirmation notices to be sent based on the combination of not voting and no contact." FEC, *The Impact of the National Voter Registration Act of 1993, A Report to the 107th Congress*, at 26 (June 30, 2001). Thus, from just after the NVRA to just before HAVA, States pushed for HAVA's clarification.

Respondents also ask the Court to ignore the debate between the DOJ and States because it was not

referenced in HAVA's legislative history. Resp. Br. 50-51. Yet, "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). The text of the Clarifying Amendment and § 21083(a)(4)(A) unambiguously permit the Supplemental Process. Regardless, those HAVA provisions did not escape notice during the lawmaking process. Legislative history is riddled with criticisms or defenses over whether States should be able to remove registrants for nonvoting and nonresponse to a notice, and over whether that would change or clarify the NVRA. *E.g.*, Hearing Before the Comm. on the Judiciary on H.R. 3295, 107th Cong., 1st Sess. 45, 48, 62-63, 67-68, 75-76, 78, 79-80, 92-93 (2001). Further, legislative actors read these provisions, just as the Secretary does, to provide that "you can't be removed simply because you haven't voted. You have to have not voted and not responded to a notice." *E.g.*, Mark Up of H.R. 3295, The Help America Vote Act of 2001: Mark Up Before the Comm. on H. Admin., 107th Cong., 1st Sess. 12 (2001) (Chairman Ney describing statements from counsel).

III. Canons Of Construction Support Ohio

As the Secretary lastly showed (at 46-57), any lingering ambiguity must be resolved in Ohio's favor because of constitutional concerns and federalism values. Respondents' counterarguments fall short.

A. Respondents Ignore Serious Constitutional Questions

The Secretary explained (at 46-53) that the Court should avoid a broad reading of the NVRA because that reading would exacerbate three serious consti-

tutional questions. Respondents claim that these questions are not sufficiently "serious" to trigger the canon. Resp. Br. 52. They argue generally that *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), held that Congress has comprehensive authority to regulate all aspects of registration. Yet *Inter Tribal* recognized that federal laws would raise serious constitutional questions if they intruded too much on the States' authority to set qualifications. *Id.* at 2258-59. And it reserved whether registration represents a "qualification" within the States' domain. *Id.* at 2259 n.9. If anything, then, that case expressly identified the constitutional concerns on which the Secretary relies.

Residency Enforcement. Respondents admit that residency is a qualification, but downplay Ohio's interest in enforcing it. If federal law gives Ohio *some* ability to enforce a qualification (no matter how impractical), they argue that no constitutional issue exists. Resp. Br. 53. That has things backward. The delegation of a power typically includes the delegation of authority over how to execute it. *See* 1 Joseph Story, *Commentaries on the Constitution of the United States* § 430, at 412-13 (1833). Thus, States, not the federal government, get to choose how to enforce their qualifications. *Inter Tribal* supports this view. It avoided the constitutional question by noting that Arizona had another way to get the "information *the State deems necessary*" for determining qualifications. 133 S. Ct. at 2259 (emphasis added).

Registration. Respondents belittle the Secretary's argument (at 51-53) that the Constitution treats registration as a "qualification." They suggest that this question depends on state law. Resp. Br. 54. Yet whether a particular voting prerequisite counts as a

"qualification" under Article I, § 2 or a "manner" regulation under Article I, § 4 represents a *federal* constitutional question turning on the meaning of those provisions—not a *state* law question turning on each state supreme court's view. An identical prerequisite to be registered 30 days before an election, Ohio Const. art. V § 1, either is or is not a qualification under the U.S. Constitution. Further, the fact that state courts hotly debated this issue as a matter of state law when registration first arose, *Morris v. Powell*, 25 N.E. 221, 223-24 (Ind. 1890), illustrates the serious nature of the federal question. So does *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which intentionally interpreted the Elections Clause to protect federalism. *Id.* at 2673-74. And if registration rules are qualifications, the Failure-To-Vote Clause *directly* infringes a qualification.

Presidential Elections. Respondents agree that the Elections Clause gives Congress authority only over *congressional* elections, but that the NVRA covers *presidential* elections. Resp. Br. 54. Yet they try to avoid the avoidance argument by claiming that they challenge the Supplemental Process only as "used in congressional elections." *Id.* at 55. To the contrary, this case arose before the 2016 election, and led to a broad injunction. Pet. App. 95a. Further, while the Secretary did not raise this specific constitutional challenge below, Resp. Br. 55, he invoked the avoidance canon generally, Appellee's Br. 35-37, 6th Cir. R.31, No. 16-3746. This issue provides yet another reason to read the NVRA in favor of state authority. That could indefinitely postpone any need for the Court to confront this glaring con-

stitutional defect. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009).

B. Respondents Wrongly Claim That Federalism Plays No Role Here

As the Secretary noted (at 54-57), federalism-protecting, clear-statement principles favor a reading that grants States latitude to perform traditional election functions. In response, Respondents insist that federalism concerns have "no application" here because *Inter Tribal* said that those concerns play no role when interpreting Elections Clause legislation. Resp. Br. 55. They overread *Inter Tribal*. It rejected only the broad presumption against preemption—which applies at the *start* of interpretation and directs courts to choose a plausible reading over the "fairest" one. 133 S. Ct. at 2257 (reading the NVRA to "mean what it says"); *cf. Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (describing presumption against preemption). Even if that presumption does not apply, federalism principles can at least "resolve ambiguity" that exists at the *end* of interpretation after all traditional tools have been exhausted. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

Indeed, Respondents' broad reading of *Inter Tribal* fails to reconcile it with *Arizona State Legislature* or *Ex Parte Siebold*, 100 U.S. 371 (1880). Respondents simply ignore *Arizona State Legislature*, which "resist[ed] reading the Elections Clause" to intrude on the States' "autonomy to establish their own governmental processes." 135 S. Ct. at 2673. If the Elections Clause *itself* should be read to accommodate federalism, it is hard to see why legislation passed under that clause should not be read in the same way. As for *Siebold*, Respondents note that it

held that Elections Clause legislation preempts state law. Resp. Br. 56. But *Siebold* added a rule of construction for interpreting such legislation, noting that the Court was "bound to presume that Congress had [exercised its Elections Clause power] in a judicious manner" and "endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." 100 U.S. at 393. This rebuts Respondents' efforts to displace all federalism concerns from this area.

Lastly, the statements from *Inter Tribal* on which Respondents rely were "unnecessary for the proper disposition of the case" because the NVRA was "unambiguous in its pre-emption of Arizona's statute." 133 S. Ct. at 2260-61 (Kennedy, J., concurring in judgment). The same cannot be said here. If anything, the NVRA and HAVA unambiguously permit Ohio's decades-old process. Yet any remaining doubt should be resolved in favor of the States' "continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials." *Id.* at 2261.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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QUESTION PRESENTED

The National Voter Registration Act of 1993 (NVRA), 52 U.S.C. 20501 *et seq.*, requires States to maintain accurate voter rolls by making a reasonable effort to remove the names of individuals who are no longer eligible to vote because they have moved or died. 52 U.S.C. 20507(a)(4). The NVRA provides that States' list-maintenance activities "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." 52 U.S.C. 20507(b)(2). Congress later amended Section 20507(b)(2) to clarify that it does not prohibit a State from removing individuals from the rolls if they fail to respond to an address-verification notice described in Section 20507(d)(2) and then fail to vote during a period spanning two federal elections. The question presented is:

Whether the NVRA prohibits a State from sending Section 20507(d)(2) address-verification notices to registrants who have not voted or otherwise contacted election officials for two years.

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U.S. Dep't of Justice, *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last updated Aug. 7, 2017) 4, 14

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INTEREST OF THE UNITED STATES

This case concerns the National Voter Registration Act of 1993 (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (52 U.S.C. 20501 *et seq.*), and the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (52 U.S.C. 20901 *et seq.*).[1] The Attorney General has authority to enforce the NVRA and HAVA by bringing civil actions seeking declaratory and injunctive relief. 52 U.S.C. 20510(a), 21111. The United States therefore has a substantial interest in the proper interpretation of the relevant statutory provisions.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

[1] All references to Title 52 of the United States Code refer to the 2015 Supplement.

STATEMENT

A. The National Voter Registration Act of 1993

1. The federal government and the States have shared constitutional authority to regulate federal elections. The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. Art. I, § 4, Cl. 1. The Clause thus "invests the States with responsibility for the mechanics of congressional elections," including voter registration, "so far as Congress declines to pre-empt state legislative choices." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (citation omitted).

Every State except North Dakota requires citizens to register before voting in federal elections. U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey: 2016 Comprehensive Report* 6 (2017). Registration establishes an individual's identity, eligibility to vote, and residence. *Id.* at 39. In most States, an individual wishing to vote must register before election day. *Id.* at 6. When voters appear at the polls, their names are "checked against the voter registration rolls to ensure that they are registered to vote and did not already vote." *Id.* at 7.

For most of our Nation's history, Congress left the regulation of voter registration to the States, which adopted a patchwork of laws. S. Rep. No. 6, 103d Cong., 1st Sess. 42, 46 (1993) (Senate Report). In 1993, however, Congress enacted the NVRA and established national registration requirements for federal elections.

2. The NVRA was enacted after a legislative process lasting more than five years. H.R. Rep. No. 9, 103d Cong.,

1st. Sess. 4-5 (1993) (House Report). As the NVRA's sponsor explained, the result was a carefully negotiated "compromise bill." *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong., 1st Sess. 2 (1993) (Rep. Swift). That compromise balanced two competing goals.

On the one hand, Congress sought to "increase the number of eligible citizens who register to vote" and to "enhance[] the participation of eligible citizens as voters." 52 U.S.C. 20501(b)(1) and (2). To make it easier to register, Congress required States to allow citizens to register by mail, at designated state agencies, and when applying for a driver's license. 52 U.S.C. 20503-20506. And to avoid requiring voters to re-register unnecessarily, Congress limited the circumstances under which States may remove names from their voter rolls. 52 U.S.C. 20507; see Senate Report 2.

On the other hand, Congress also sought to "protect the integrity of the electoral process" and to ensure that States maintain "accurate and current" voter rolls. 52 U.S.C. 20501(b)(3) and (4). Congress recognized that, among other things, accurate registration lists are essential to "prevent[ing] voter fraud." Senate Report 18. It thus concluded that the goal of "open[ing] the registration process * * * must be balanced with the need to maintain the integrity of the election process by updating the voter rolls on a continual basis." *Ibid.*

3. To ensure the accuracy of the voter rolls, the NVRA requires each covered State to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the lists of eligible voters by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant." 52 U.S.C.

20507(a)(4).[2] Congress left the States substantial latitude to design their own list-maintenance programs, subject to federal requirements. Three of those requirements are particularly relevant here.

First, Section 20507(d) establishes a mandatory procedure for change-of-residence removals. It provides that a State "shall not remove the name of a registrant * * * on the ground that the registrant has changed residence" unless the registrant either (A) confirms the change in writing or (B) "has failed to respond to a notice described in" Section 20507(d)(2) and "has not voted or appeared to vote" during a period spanning the next two general federal elections. 52 U.S.C. 20507(d)(1).

A notice described in Section 20507(d)(2) is an address-verification notice sent by forwardable mail that includes "a postage prepaid and pre-addressed return card." 52 U.S.C. 20507(d)(2). The notice must inform registrants that if they have not moved (or have moved within the registrar's jurisdiction), they should return the card to maintain their registration. *Ibid.* The notice must further state that if a registrant does not return the card or vote during the relevant period, "the registrant's name will be removed from the list of eligible voters." 52 U.S.C. 20507(d)(2)(A). Section 20507(d) does not prescribe or restrict the grounds on which States may send address-verification notices.

Second, Section 20507(c)(1) describes an optional program that States may use to satisfy their obligation

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[2] Six States are exempt from the NVRA because they do not require registration to vote in federal elections or allow registration at the polls on election day. 52 U.S.C. 20503(b); see U.S. Dep't of Justice, *The NVRA: Questions and Answers*, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last updated Aug. 7, 2017) (*DOJ Guidance*) (Question 2).

to make a reasonable effort to remove ineligible voters from the rolls. Under that safe-harbor program, a State obtains the names of individuals who have notified the United States Postal Service of a change in their address and then follows the Section 20507(d) notice procedure for individuals who appear to have moved outside the jurisdiction in which they are registered. 52 U.S.C. 20507(c)(1).

Third, Section 20507(b)(2) as originally enacted specified that States' list-maintenance programs "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." NVRA § 8(b)(2), 107 Stat. 83. In adopting that requirement, Congress sought to eliminate the pre-NVRA practice by which some States had removed registrants from the rolls "merely because they ha[d] failed to cast a ballot in a recent election." Senate Report 17. Congress concluded that individuals who fail to vote "may not have moved or died" and that eligible individuals should not be removed from the rolls "merely for exercising their right not to vote." *Ibid.*

B. The Help America Vote Act of 2002

1. After the NVRA took effect, States adopted a variety of approaches to comply with their Section 20507(a)(4) duty to make a reasonable effort to maintain accurate voter rolls. See Fed. Election Comm'n, *Implementing the NVRA: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, at 5-1 to 5-42 (Mar. 1998) (*1998 FEC Report*) (D. Ct. Doc. 38-16 (May 24, 2016)). As particularly relevant here, some States "use[d] failure to vote * * * over a certain period of time as a trigger for sending the forwardable confirmation notices" described in Section 20507(d)(2). *Id.* at 5-36. The Department of Justice

took the position that this practice of sending address-verification notices based on nonvoting violated Section 20507(b)(2)'s prohibition on removals for failure to vote. *Id.* at 5-22. But several States continued to send notices based on nonvoting, and the Federal Election Commission (FEC) reported in 1998 that the legality of that practice "ha[d] not yet been resolved." *Id.* at 5-36.

2. In 2002, Congress enacted HAVA, which included two provisions that are relevant here.

First, Congress amended Section 20507(b)(2). The amendment retained Section 20507(b)(2)'s original language prohibiting removals for failure to vote, but added a clause clarifying that prohibition's relationship to Section 20507(d). As amended, Section 20507(b)(2) provides that a State's list-maintenance program

> shall not result in the removal of the name of any person * * * by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—*
>
> > *(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then*
> >
> > *(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. 20507(b)(2) (new text emphasized); see HAVA § 903, 116 Stat. 1728.

Second, HAVA directed States to develop "statewide voter registration list[s]." 52 U.S.C. 21083(a)(1)(A). As in the NVRA, Congress required States to adopt "[a]

system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 52 U.S.C. 21083(a)(4)(A). Specifically, Congress provided that, "consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Ibid.*

C. The Present Controversy

1. Since 1994, Ohio has used two procedures to remove registrants from the rolls on the ground that they have changed residences. Pet. App. 43a. The first is the safe-harbor process described in Section 20507(c), which the parties have called the "NCOA process" because it relies on the United States Postal Service's National Change of Address database. *Id.* at 4a, 44a-45a.

This case concerns Ohio's other procedure, which the parties have called the "Supplemental Process." Pet. App. 5a. Under the Supplemental Process, Ohio sends Section 20507(d)(2) address-verification notices to registrants who have not voted or engaged in other "voter activity" for two years. *Id.* at 5a, 46a. Consistent with Section 20507(d), registrants are removed from the rolls if they fail to respond to the notice and then fail to vote for an additional four-year period including two general federal elections. *Id.* at 5a, 47a.

2. Respondents are two nonprofit organizations and an Ohio voter. Pet. App. 2a-3a. In April 2016, they filed this suit against petitioner, the Ohio Secretary of State. *Id.* at 3a, 7a. Respondents principally argued that the Supplemental Process violates Section 20507(b)(2) by removing registrants by reason of their

failure to vote. *Id.* at 49a-50a. The district court rejected respondents' challenge to the Supplemental Process and entered judgment for petitioner. *Id.* at 39a-70a.

The district court first concluded that the Supplemental Process is covered by the clarifying clause added in HAVA, which specifies that Section 20507(b)(2) may not be construed to prevent a State from removing registrants "using the procedures described in [Section 20507](c) and (d)." 52 U.S.C. 20507(b)(2); see Pet. App. 55a. The court reasoned that "the unambiguous text" of that clause "specifically permits the Ohio Supplemental Process" because the Supplemental Process removes registrants using the procedure described in Section 20507(d). Pet. App. 59a; see *id.* at 55a-56a.

The district court also concluded that, even apart from the clarifying clause, the Supplemental Process "is consistent with both the NVRA and HAVA" because "voters are never removed from the voter registration rolls *solely* for failure to vote." Pet. App. 57a. The court explained that a failure to vote for two years *initiates* the Section 20507(d) process, but that registrants are not *removed* unless they fail to respond to a notice and fail to vote for the additional period specified in Section 20507(d).

3. A divided panel of the court of appeals reversed. Pet. App. 1a-37a.

a. The court of appeals first held that the Supplemental Process is not covered by HAVA's clarifying clause. Pet. App. 14a-20a. The court stated that the clause exempts from Section 20507(b)(2)'s prohibition only the specific use of nonvoting mandated by Section 20507(d)—the removal of registrants who fail to vote *after* receiving a Section 20507(d)(2) notice. *Id.* at 15a. The court therefore concluded that the clause does not

shield the Supplemental Process's use of nonvoting as the "trigger" for sending Section 20507(d)(2) notices in the first place. *Id.* at 15a-17a.

The court of appeals next held that the Supplemental Process violates Section 20507(b)(2)'s prohibition on removals "by reason of" registrants' failure to vote. Pet. App. 20a-24a. The court again emphasized that the Supplemental Process uses nonvoting as the "trigger" for sending Section 20507(d)(2) notices. *Id.* at 21a. The court stated that, "[u]nder the ordinary meaning of 'result,' the Supplemental Process would violate [Section 20507(b)(2)] because removal of a voter 'proceeds or arises as a consequence of his or her [initial] failure to vote.'" *Ibid.* (brackets and citation omitted). The court acknowledged that "subsection (b)(2)'s prohibition clause appears to have been given a more narrow interpretation by the HAVA," *ibid.*, which specifies that a registrant's name may not be removed "*solely* by reason of a failure to vote," 52 U.S.C. 21083(a)(4)(A) (emphasis added). But the court nonetheless concluded that the Supplemental Process violates Section 20507(b)(2) because the "trigger" for sending notices is "based 'solely' on a person's failure to vote." Pet. App. 22a.

b. Judge Siler dissented in relevant part. Pet. App. 32a-37a. He explained that, under the NVRA and HAVA, a State cannot remove registrants "for a failure to vote only." *Id.* at 34a. He concluded that the Supplemental Process does not violate that prohibition because it removes registrants only if they both fail to vote and fail to respond to a notice. *Ibid.*

SUMMARY OF ARGUMENT

Ohio and several other States have long used a registrant's failure to vote for a specified period of years as grounds for sending an address-verification notice under 52 U.S.C. 20507(d)(2). That practice does not violate the NVRA.

A. It is undisputed that Section 20507(d) itself does not restrict the grounds on which States may send address-verification notices. Instead, the court of appeals held that sending notices based on nonvoting violates Section 20507(b)(2)'s prohibition on removing a registrant "by reason of the person's failure to vote." That is not the best reading of Section 20507(b)(2) as originally enacted, and it is foreclosed by the clarifying clause that Congress added in HAVA.

1. Section 20507(b)(2)'s original prohibition on removing a registrant "by reason of the person's failure to vote" is best interpreted to prohibit removing a registrant *solely* for nonvoting. That is because a different provision, Section 20507(d), *requires* States to use nonvoting as the final precondition for removal, and Section 20507(b)(2) cannot be read to forbid what Section 20507(d) compels. Congress later confirmed that understanding in a related provision, which describes Section 20507(b)(2) as providing that "no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. 21083(a)(4)(A) (emphasis added).

The Supplemental Process thus does not violate Section 20507(b)(2) because it does not remove registrants solely for their initial failure to vote. Registrants are sent a notice because of that initial failure, but they are not removed unless they fail to respond and fail to vote for the additional period prescribed in Section 20507(d).

2. HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting. The amendment was enacted against the backdrop of a dispute about the legality of that practice, and Congress resolved the dispute by clarifying that "nothing in [Section 20507(b)(2)] may be construed to prohibit a State from using the procedures described in [Section 20507](c) and (d) to remove an individual from the official list of eligible voters." 52 U.S.C. 20507(b)(2). Accordingly, although removals accomplished using the Section 20507(d) procedure may in some circumstances violate other NVRA provisions, HAVA's amendment makes clear that they do not violate Section 20507(b)(2). That is particularly clear because a contrary interpretation would deprive the amendment of practical effect.

3. The court of appeals erred in assuming that Section 20507(b)(2) would be superfluous unless it prohibited some removals that follow the Section 20507(d) procedure. Section 20507(d)'s procedure applies only when a State removes a registrant's name from the rolls "on the ground that the registrant has changed residence." 52 U.S.C. 20507(d)(1). Section 20507(b)(2)'s prohibition on removals for nonvoting applies more broadly, covering all of a State's list-maintenance activities. It thus makes clear that a State may not treat nonvoting itself as a sufficient basis for removal, and it also prevents a State from presuming that a registrant who has failed to vote has become ineligible on some ground other than a change of residence.

B. In addition to relying on Section 20507(b)(2), respondents have argued that the Supplemental Process violates an asserted requirement that a State may send

a Section 20507(d)(2) notice only if it receives some "reliable information" affirmatively indicating that a registrant has moved. The court of appeals did not rely on that argument, which improperly seeks to impose a requirement that Congress did not adopt. Neither Section 20507(d) nor any other provision of the NVRA imposes a "reliable information" standard or requires States to satisfy specific requirements before sending Section 20507(d)(2) notices. Early versions of the bill that became the NVRA included such prerequisites, but Congress rejected those proposals in favor of the more flexible approach reflected in the NVRA.

C. The NVRA's history and purpose reinforce the conclusion that States may send Section 20507(d)(2) notices based on nonvoting. Before the NVRA, most States removed registrants who had failed to vote for specified periods. Most of those States notified registrants and allowed them to avoid removal or re-register, but the notice procedures could be burdensome—and a few States failed to provide any notice at all. The NVRA eliminated the practice of removing nonvoters without notice and required States to use more protective notice procedures. But the legislative history indicates that Congress did not require States to abandon entirely the widespread practice of treating nonvoting as an indication that a registrant may have become ineligible.

Allowing States to send Section 20507(d)(2) notices based on nonvoting is also consistent with Congress's objective of ensuring accurate voter rolls while leaving the States substantial flexibility. Ohio and other States have determined that the most appropriate way to maintain accurate voting lists is to use nonvoting as an indication that a registrant may have moved, and to seek to verify the registrant's continued residence using

the procedure in Section 20507(d). Under the flexible structure Congress adopted in the NVRA and clarified in HAVA, that judgment is left to the States.

ARGUMENT

THE NVRA DOES NOT PROHIBIT STATES FROM USING REGISTRANTS' FAILURE TO VOTE AS GROUNDS FOR SENDING ADDRESS-VERIFICATION NOTICES UNDER 52 U.S.C. 20507(d)(2)

Ohio and several other States have long used a registrant's failure to vote for a specified period of years as grounds for sending an address-verification notice under 52 U.S.C. 20507(d)(2). That practice does not violate the NVRA. Nothing in Section 20507(d) itself limits the grounds on which States may send Section 20507(d)(2) notices. And although Section 20507(b)(2) prohibits the removal of a registrant "by reason of the person's failure to vote," it does not bar a State from using nonvoting as grounds for sending an address-verification notice. Registrants removed using that procedure are not removed "by reason of" their initial failure to vote. They are *sent a notice* because of that failure, but they are not *removed* unless they fail to respond and fail to vote for the additional period prescribed in Section 20507(d).

In the 15 years since HAVA's enactment, the Department of Justice has not taken enforcement action against Ohio or the other States that send Section 20507(d)(2) notices based on nonvoting. But the Department argued that the NVRA forbids that practice in a guidance document first issued in 2010 and in two recent amicus filings, including a brief filed in the court

of appeals in this case. Gov't C.A. Br. 2.[3] After this Court's grant of review and the change in Administrations, the Department reconsidered the question. It has now concluded that the NVRA does not prohibit a State from using nonvoting as the basis for sending a Section 20507(d)(2) notice. That conclusion is supported by the NVRA's text, context, and history. It is also faithful to the careful balance that Congress struck in the NVRA and clarified in HAVA.[4]

A. Section 20507(b)(2) Does Not Prohibit States From Sending Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

Section 20507(d) authorizes States to remove a registrant's name from the rolls if the registrant fails to respond to an address-verification notice and then fails to vote during a period spanning two federal elections. Section 20507(d) itself does not restrict the grounds on which States may send address-verification notices, and thus does not preclude Ohio from sending those notices to registrants who have not voted for two years. The

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[3] The Department's post-HAVA enforcement actions reflect inconsistent positions on this issue. In 2007, the Department entered into a consent decree prohibiting a New Mexico county from sending Section 20507(d)(2) notices based on registrants' failure to vote. Amended Joint Stipulation ¶ 13, *United States* v. *Cibola Cnty.*, No. 93-cv-1134 (D.N.M. Jan. 31, 2007) (Gov't C.A. Br. Attach. 7). Later that year, however, the Department entered into a settlement with the Philadelphia Board of Elections that *required* the Board, consistent with Pennsylvania law, to send Section 20507(d)(2) notices to registrants who had not "voted nor appeared to vote" (or contacted the Board in a manner that resulted in a change in their voting records). Settlement Agreement ¶ 16(5), *United States* v. *City of Phila.*, No. 06-cv-4592 (E.D. Pa. Apr. 26, 2007) (Gov't C.A. Br. Attach. 11).

[4] The Department has updated its NVRA guidance to reflect the interpretation set forth in this brief. *DOJ Guidance* (Question 36).

court of appeals nonetheless held that Ohio's practice violates Section 20507(b)(2)'s prohibition on removing a registrant from the rolls "by reason of the person's failure to vote." That is not the best reading of Section 20507(b)(2) as originally enacted, and it is foreclosed by the clarifying clause that Congress added in HAVA.

1. Sending Section 20507(d)(2) notices based on nonvoting does not violate Section 20507(b)(2) because it does not result in the removal of registrants "by reason of" their failure to vote

a. As originally enacted, Section 20507(b)(2) provided that States' list-maintenance programs "shall not result in the removal of the name of any person * * * by reason of the person's failure to vote." NVRA § 8(b)(2), 107 Stat. 83. That provision barred States from treating failure to vote itself as a sufficient basis for removing a registrant from the rolls. It also made clear that State programs to remove ineligible registrants may not presume that registrants have become ineligible solely because they have failed to vote.

Section 20507(b)(2) did not, however, prohibit all list-maintenance procedures in which the failure to vote is *a* cause of a registrant's removal. To the contrary, the NVRA itself makes nonvoting a cause of change-of-residence removals under Section 20507(d), which provides that a State may remove a registrant's name from the rolls only if the registrant "has failed to respond to a [Section 20507(d)(2)] notice" and "has not voted or appeared to vote" during a period spanning the next two general federal elections. 52 U.S.C. 20507(d)(1). Section 20507(d) thus *requires* States to use nonvoting in their list-maintenance programs—in fact, it makes a failure to vote the final precondition for removal.

Section 20507(b)(2) cannot sensibly be construed to forbid the use of nonvoting that Section 20507(d) mandates. Instead, courts must interpret the statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (*Brown & Williamson*) (citations omitted). As the district court and Judge Siler explained, the most natural way to harmonize Section 20507(b)(2)'s prohibition with Section 20507(d)'s mandate is to conclude that registrants are removed "by reason of" their failure to vote in violation of Section 20507(b)(2) only if they are removed *solely* for nonvoting. Pet. App. 34a, 57a.

Congress confirmed that interpretation in HAVA. As explained below, see Part A.2, *infra*, HAVA amended Section 20507(b)(2) by adding a clarifying clause that resolves the question presented here. But HAVA also included a related provision that reinforces the natural interpretation of Section 20507(b)(2) as originally enacted. That provision requires States to create statewide voter lists and to maintain them in a manner "consistent with the [NVRA]." 52 U.S.C. 21083(a)(4). Congress then described Section 20507(b)(2)'s prohibition on removals for nonvoting as providing that "no registrant may be removed *solely* by reason of a failure to vote." *Ibid.* (emphasis added). The use of the word "solely" confirms that Section 20507(b)(2)'s prohibition on removals "by reason of" a registrant's failure to vote prohibits only removals based on nonvoting alone.

b. Ohio's Supplemental Process and similar state programs do not violate Section 20507(b)(2)'s prohibition because they do not remove registrants solely for nonvoting. Instead, registrants are removed only if they (i) initially fail to vote a specified period, (ii) fail to

respond to a notice seeking to verify their residence, and then (iii) fail to vote for an additional period spanning two federal elections. Registrants who are removed in part because they failed to respond to an address-verification notice are not removed solely for nonvoting.

The court of appeals appeared to agree that the phrase "by reason of the person's failure to vote" in Section 20507(b)(2) should be interpreted to mean "solely by reason of the person's failure to vote." Pet. App. 21a-22a. But the court nonetheless held that the Supplemental Process violates Section 20507(b)(2) because the "trigger [for sending Section 20507(d)(2) notices] is ultimately based 'solely' on a person's failure to vote." *Id.* at 22a. Respondents echo that view, emphasizing that the Supplemental Process "relies on failure to vote—and failure to vote alone—to subject the voter to the Address Confirmation Procedure." Br. in Opp. 31.

The court of appeals focused on the wrong question. Section 20507(b)(2) does not refer to "triggers," and it does not prohibit a State from *sending notices* "by reason of" a person's failure to vote. Instead, it prohibits "the *removal* of the name of any person * * * by reason of the person's failure to vote." 52 U.S.C. 20507(b)(2) (emphasis added); see 52 U.S.C. 21083(a)(4)(A) ("[N]o registrant may be *removed* solely by reason of a failure to vote.") (emphasis added). Respondents do not contend—and could not plausibly contend—that the Supplemental Process results in the *removal* of any registrant solely because of nonvoting.

c. Even if Section 20507(b)(2)'s prohibition were not limited to removals based solely on nonvoting, it still would not bar States from using nonvoting as grounds

for sending address-verification notices. If the recipient of such a notice fails to respond and then fails to vote for the additional period prescribed in Section 20507(d), the initial period of nonvoting is unquestionably a but-for cause of the ultimate removal. As this Court has recognized in a variety of contexts, however, "by reason of" and similar statutory phrases ordinarily require not merely but-for causation, but proximate causation as well. *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010); see *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (collecting cases). The familiar proximate-cause requirement excludes but-for causes that are not legally cognizable because they are "too remote, purely contingent, or indirect." *Hemi Grp.*, 559 U.S. at 9 (brackets and citation omitted). "Every event has many causes, * * * and only some of them are proximate." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014).

A registrant's initial failure to vote is not a proximate cause of a removal under the Supplemental Process. As the district court explained, "registrants are *queried* on the basis of their initial failure to vote, but not *removed* on that basis." Pet. App. 57a (citation omitted). Instead, they are removed only years later, if they fail to respond to the notice and fail to vote for an additional period spanning two general federal elections. That connection between the initial failure to vote and the ultimate removal is too remote to satisfy traditional proximate-causation standards—particularly because the causal chain includes the registrants' own failure to return postage prepaid cards seeking to verify their

residence. Cf. *Hemi Grp.*, 559 U.S. at 10 ("[T]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.") (citation omitted).[5]

2. HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting

HAVA's clarifying amendment confirms that Section 20507(b)(2) does not prohibit States from sending Section 20507(d)(2) notices based on nonvoting. That clause was adopted against the backdrop of a recognized dispute over the question presented here. Congress resolved the dispute by directing that Section 20507(b)(2) may not be construed to prohibit a State from removing a registrant using the procedure described in Section 20507(d). Such a removal could in some circumstances violate other provisions of the NVRA, including the requirement that a State's list-maintenance activities be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. 20507(b)(1). But HAVA makes clear that a State that follows the procedure described in Section 20507(d) does not violate Section 20507(b)(2)'s prohibition on removals for nonvoting.

a. The NVRA directed the FEC to "provide information to the States with respect to the responsibilities of the States under [the NVRA]." NVRA § 9(a)(4), 107

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[5] The registrants' failure to vote *after* receipt of the notice could fairly be deemed a proximate cause of their removal—indeed, it is the most immediate cause. But that use of nonvoting is specifically authorized by Section 20507(d), and respondents thus do not contend that it violates the NVRA. Instead, respondents' claim is that the Supplemental Process violates Section 20507(b)(2) because it results in the removal of registrants "by reason of" their initial, *pre-notice* failure to vote.

Stat. 87. Even before the NVRA took effect, the FEC advised the States that a dispute had arisen over the question presented here. The FEC observed that some States were considering "[s]ending the forwardable confirmation notice provided for in Section [20507](d)(2) based on the assumption that failure to vote over an extended period of time may indicate that the registrant no longer lives in the jurisdiction." FEC, *Implementing the NVRA: Requirements, Issues, Approaches, and Examples* 5-22 (Jan. 1, 1994) (D. Ct. Doc. 38-17 (May 24, 2016)). The FEC noted that this approach was "considered by some advocates to violate the [NVRA] because the ultimate effect of the action would be to remove people for failure to vote." *Id.* at 5-23. But the FEC itself did not express a view on that question.

In a 1998 update, the FEC reported that at least five States were using "failure to vote or failure to maintain contact [with election officials] as a trigger for sending [Section 20507(d)(2)] confirmation notices." *1998 FEC Report* 5-36. The FEC noted that the Department of Justice had argued in letters and enforcement actions that this practice violated the NVRA. *Ibid.* But the FEC advised that "the issue, which involves the interpretation of existing law, has not yet been resolved." *Ibid.*; see *id.* at 5-22 ("The issue * * * remains a question of the legal interpretation of NVRA provisions.").

b. Congress acted against this backdrop when it enacted HAVA in 2002. In a provision entitled "clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence," HAVA amended Section 20507(b)(2) by adding the following clause:

> [N]othing in this paragraph may be construed to prohibit a State from using the procedures described in

> subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

HAVA § 903, 116 Stat. 1728 (capitalization altered); see 52 U.S.C. 20507(b)(2).

That clarification forecloses respondents' claim because it specifies that Section 20507(b)(2) may not be construed to prohibit what Ohio seeks to do. Under the Supplemental Process, Ohio "us[es] the procedures described in" Section 20507(d) "to remove an individual from the official list of eligible voters if the individual" has not responded to an address-verification notice and has not voted in a period spanning two general federal elections. 52 U.S.C. 20507(b)(2). There is no dispute that "the Supplemental Process fully incorporates [Section 20507(d)'s] procedure." Pet. App. 14a-15a. And because the Supplemental Process falls within the plain terms of the clarifying clause, "nothing in [Section 20507(b)(2)] may be construed to prohibit" the resulting removals. 52 U.S.C. 20507(b)(2).

c. The court of appeals adopted a different reading of HAVA's clarifying clause. In the court's view, the clause means only that Section 20507(b)(2) may not be construed to prohibit "the expressly permitted procedures outlined in subsections (c) or (d)." Pet. App. 20a; see Resp. Br. in Opp. 30. In other words, the court held

that the clarifying clause protects only the use of nonvoting that is specifically required as the final precondition for removal under Section 20507(d) (and by the safe-harbor program in Section 20507(c), which incorporates the Section 20507(d) procedure). That reading is unpersuasive for two reasons.

First, it is inconsistent with the text of the clarifying clause. Congress could have specified that "nothing in Section 20507(b)(2) may be construed to prohibit a State from using the failure to vote to the extent such use is required under subsections (c) and (d)." But Congress did not enact that language, or anything like it. Instead, Congress provided that Section 20507(b)(2) may not be construed "to prohibit a State from using the procedures described in subsections (c) and (d) to *remove* an individual from the official list of eligible voters." 52 U.S.C. 20507(b)(2) (emphasis added). That language covers any removal accomplished using the Section 20507(d) procedure—not just the specific use of nonvoting required in Section 20507(d).

Second, the court of appeals' interpretation would deprive the HAVA amendment of any practical effect. In the court's view, that amendment merely makes clear that Section 20507(b)(2) does not prohibit what Section 20507(d) specifically requires. But that was clear even without the amendment—both because a statute must be construed as "an harmonious whole," *Brown & Williamson*, 529 U.S. at 133 (citation omitted), and because any conflict between the specific requirements of Section 20507(d) and the general prohibition in Section 20507(b)(2) would have been resolved by the "commonplace of statutory construction that the specific governs the general," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted).

Even before HAVA, therefore, there was no plausible argument that Section 20507(b)(2) prohibited what Section 20507(d) requires. There is also no indication that anyone advanced such an argument. This Court should not conclude that Congress amended Section 20507(b)(2) to foreclose an implausible interpretation that no one had advocated. "When Congress acts to amend a statute," the Court "presume[s] it intends its amendment to have real and substantive effect." *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016) (citation and internal quotation marks omitted). Consistent with the natural reading of its text, the HAVA amendment should thus be interpreted as clarifying that Section 20507(b)(2) may not be construed to prohibit a removal accomplished using the procedure in Section 20507(d). On that understanding, the amendment had "real and substantive effect," *ibid.*, because it settled a recognized dispute between the Department of Justice and the States on a question that the agency charged by Congress with disseminating information about the NVRA had recently identified as one that "ha[d] not yet been resolved." *1998 FEC Report* 5-36.[6]

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[6] Respondents err in asserting (Br. in Opp. 28-30) that this understanding contravenes Congress's direction that HAVA should not "be construed to authorize or require conduct prohibited under [the NVRA]." 52 U.S.C. 21145(a). The HAVA amendment did not alter the meaning of Section 20507(b)(2) as originally enacted; instead, it "clarif[ied]" that provision to resolve a recognized interpretive dispute. HAVA § 903, 116 Stat. 1728 (capitalization altered).

3. Interpreting Section 20507(b)(2) to allow States to send Section 20507(d)(2) notices based on nonvoting does not create surplusage

a. The court of appeals placed great weight on its belief that Section 20507(b)(2) would be "mere surplusage" unless it prohibited some removals that follow the Section 20507(d) procedure. Pet. App. 17a; see *id.* at 23a. The court reasoned that because Section 20507(d)(1) provides that States *must* follow the procedure described in Section 20507(d), Section 20507(b)(2) "would serve no purpose" if it were deemed inapplicable to removals that incorporate that procedure. *Id.* at 17a. That is not correct.

Section 20507(d)'s mandatory procedure applies only when a State removes a registrant's name from the rolls "on the ground that the registrant has changed residence." 52 U.S.C. 20507(d)(1). Section 20507(b)(2), in contrast, covers all aspects of a State's "program or activity" to maintain "an accurate and current voter registration roll." 52 U.S.C. 20507(b). Section 20507(b)(2) is thus neither "inoperative" nor "superfluous." *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (citation omitted). It serves one of the key purposes of the NVRA's list-maintenance provisions because it bars States from removing individuals "merely because they have failed to cast a ballot in a recent election." Senate Report 17. Section 20507(b)(2) expressly directs, in other words, that a State may not treat nonvoting itself as a sufficient ground for removal.[7] It also prevents a State from presuming that a registrant who has failed to vote has died

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[7] Another provision of the NVRA arguably accomplishes the same result implicitly by specifying that the name of an individual who is validly registered "may not be removed from the official list of eligible voters except" on specified grounds, including "at the request

or otherwise become ineligible on a ground other than a change in residence. Cf. 52 U.S.C. 20507(a)(4)(A) (requiring States to remove the names of registrants who have become ineligible because of "the death of the registrant," but without specifying a mandatory procedure like the one in Section 20507(d)).

b. In the court of appeals, the Department of Justice advanced a different surplusage argument based on the HAVA provision that requires States to create statewide voter lists and adopt "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 52 U.S.C. 21083(a)(4)(A). That provision directs that:

> Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*

Ibid. (emphasis added). The Department argued that the interpretation set forth in this brief would render the italicized language superfluous because it would mean that a registrant who is removed after failing to return a notice is *never* removed "solely by reason of a failure to vote." Gov't C.A. Br. 22-24. To avoid that asserted superfluity, the Department argued that a regis-

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of the registrant," "by reason of criminal conviction or mental incapacity," or by reason of death or a change in residence. 52 U.S.C. 20507(a)(3) and (4). But given the importance that Congress placed on barring removals based solely on the failure to vote, see Senate Report 17-18, it is not surprising that it made that prohibition explicit in Section 20507(b)(2), rather than leaving it implicit in the omission of failure to vote as a permissible basis for removal.

trant should be viewed as being removed "solely by reason of a failure to vote" if nonvoting is "the *trigger* for the Section [20507](d) notice." *Id.* at 23.

That argument is unpersuasive because it contradicts the plain language of Section 21083(a)(4). By definition, registrants who are removed because they "have not responded to a notice" *and* "have not voted in 2 consecutive general elections" are not removed "*solely* by reason of a failure to vote." 52 U.S.C. 21083(a)(4)(A) (emphasis added). This Court's "preference for avoiding surplusage constructions is not absolute," and it cannot prevail where, as here, the asserted superfluity could be avoided only by departing from the "plain meaning" of the statutory text. *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).[8]

The better reading of Section 21083(a)(4)(A) is that it is an imprecise reference to the requirements set forth in more detail in Section 20507. On that view, the italicized language reiterates Section 20507(b)(2)'s general prohibition on removing a registrant solely for failing to vote—but it does not imply that registrants could somehow be removed "solely by reason of a failure to vote" if they are removed for failing to vote *and* failing to respond to a notice.

HAVA's legislative history confirms that reading. During committee consideration of the bill, a Member

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[8] In addition, "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Microsoft* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted). The canon thus does not apply here because the court of appeals' interpretation would create a more glaring superfluity by denying any effect to the provision of HAVA amending Section 20507(b)(2). See pp. 22-23, *supra*.

observed that the italicized language appeared "unnecessary" because the preceding clause "makes very clear that you cannot remove someone unless they have not voted" *and* "have not responded to a notice." *Mark Up of H.R. 3295, the Help America Vote Act of 2001: Mark Up Before the Comm. on H. Admin.*, 107th Cong., 1st Sess. 12 (2001) (Rep. Doolittle). No one suggested a contrary interpretation. Instead, another Member confirmed the superfluity, explaining that "both" the italicized language and the preceding clause "mean that you can't remove somebody for not voting solely." *Ibid.* (Rep. Hoyer).

B. No Other Provision Of Section 20507 Prohibits States From Sending Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

The court of appeals held that the Supplemental Process violates Section 20507(b)(2) because it results in the removal of registrants by reason of their failure to vote. Pet. App. 23a-24a. Respondents also argued, in the alternative, that the Supplemental Process violates an asserted requirement that a State may not send a Section 20507(d) notice unless it receives "reliable information" affirmatively indicating that a voter has moved. Resp. C.A. Br. 37; see Gov't C.A. Br. 17-20. The NVRA does not impose that requirement.

1. As the district court explained, neither Section 20507(d) nor any other provision of the NVRA addresses "who should be sent a confirmation notice or when that confirmation notice should be sent." Pet. App. 56a. Congress could have imposed a "reliable information" standard or some other specific prerequisite for sending Section 20507(d)(2) notices, but it did not. Instead, "that decision is left to the states." *Ibid.* In arguing that States may send Section 20507(d) notices

only based on "reliable information" affirmatively indicating a change in residence, respondents seek to "read requirements and language into the NVRA that simply are not there." *Ibid.*

2. Although nothing in Section 20507 explicitly requires a State to have "reliable information" affirmatively indicating a change in residence before sending a Section 20507(d)(2) notice, respondents and the Department of Justice have argued that such a requirement is implicit in Section 20507(a)(4) and Section 20507(c)(1). Neither provision supports that view.

Section 20507(a)(4) requires States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters." 52 U.S.C. 20507(a)(4). Respondents and the Department of Justice have argued that sending Section 20507(d)(2) notices absent reliable information affirmatively suggesting a move violates that requirement because it "is not a *reasonable* way to identify persons who have changed residence." Gov't C.A. Br. 20 (emphasis added); see Resp. C.A. Br. 36-37.

As the context makes clear, however, Section 20507(a)(4) uses the qualifier "reasonable effort" to temper States' duty "to remove the names of ineligible voters." 52 U.S.C. 20507(a)(4). A State need not remove every ineligible registrant; it need only make a "reasonable effort" to do so. The word "reasonable" thus affords States some latitude in complying with the requirement in Section 20507(a)(4). It should not be read to authorize courts to impose additional *restrictions* on state removals beyond those that Congress adopted in the detailed and specific provisions of Section 20507. A court would, for example, have no principled basis for assessing respondents' contention that a registrant's

failure to vote for two years is not a "reasonable" basis for sending a Section 20507(d)(2) notice—or for determining whether four, ten, or 20 years of nonvoting would qualify as "reasonable."

Respondents have also emphasized that the safe-harbor program described in Section 20507(c)(1) uses Section 20507(d)(2) notices to "confirm" a change of residence suggested by information from the United States Postal Service. 52 U.S.C. 20507(c)(1)(B)(ii). Respondents have therefore asserted that any other use of a Section 20507(d)(2) notice must seek to confirm some comparably reliable indication that a registrant has moved. Resp. C.A. Br. 37; see Gov't C.A. Br. 17-19. But the Section 20507(c) program is optional. It makes clear that States "*may*" initiate the Section 20507(d) process based on information from the Postal Service, but it does not *preclude* them from utilizing different or additional triggers. 52 U.S.C. 20507(c)(1) (emphasis added). If Congress had intended to restrict the Section 20507(d) notice process to "confirming" some affirmative evidence of a change of residence, it would have said so expressly—not through oblique inferences from Section 20507(c)'s optional procedure.

3. Congress's failure to restrict the grounds on which States may send Section 20507(d)(2) notices was not inadvertent. An early version of the NVRA would have authorized States to send address-verification notices only if they first "determine[d] that a registrant may have changed his residence." S. 874, 101st Cong., 1st Sess. § 6(d) (as reported in the Senate Sept. 26, 1989); see S. Rep. No. 140, 101st Cong., 1st Sess. 20 (1989) ("The 'determination' referred to in subsection (d) * * * must be based on some reason to believe such voter is no longer at the registered address."). Another

predecessor bill would have authorized States to send a Section 20507(d)(2) notice only if the NCOA database indicated that a registrant had moved or an earlier notice was returned as undeliverable. H.R. Rep. No. 243, 101st Cong., 1st Sess. 3-4, 18-20 (1989). Congress rejected those proposals, and this Court should not interpret the NVRA to impose by implication requirements that Congress considered but declined to adopt.

C. The NVRA's History And Purpose Confirm That States May Send Section 20507(d)(2) Notices Based On Registrants' Failure To Vote

The history and purpose of the NVRA reinforce the conclusion that a State may send Section 20507(d)(2) notices based on registrants' failure to vote.

1. When Congress enacted the NVRA, most States had laws providing for the removal of registrants who had failed to vote for a specified period. Senate Report 46; House Report 30; see Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 550-551 (1988) (Barber) (collecting state laws). Those States either deemed nonvoting itself to be sufficient grounds for removal or treated it "as an indication that an individual might have moved." Senate Report 46; House Report 30. Most States notified the affected registrants of the removal, but five simply cancelled their registrations without notice. Barber 500, 550-551. Of the States that provided notice, some allowed registrants to remain on the rolls if they returned a postcard, while others imposed more burdensome requirements and still others required the affected individuals to register again. *Id.* at 506-507, 552-555.

The NVRA eliminated the practice of simply cancelling the registration of individuals who fail to vote.

52 U.S.C. 20507(b)(2). In addition, Section 20507(d) requires States to employ more protective notice procedures than those that prevailed before the NVRA. Registrants must be sent notices that include "postage prepaid and pre-addressed return card[s]" allowing them to remain registered, and even registrants who fail to return those cards must remain on the rolls for a period including the next two general federal elections. 52 U.S.C. 20507(d)(2).

The court of appeals interpreted the NVRA to require States not only to bring their notice procedures into conformity with Section 20507(d), but also to abandon entirely the practice of treating nonvoting as an indication that a registrant may have changed residences. At least two aspects of the NVRA's legislative history suggest that Congress did not mandate such a dramatic departure from pre-NVRA practices.

First, the report prepared by the Congressional Budget Office (CBO) on the costs of the NVRA—which was incorporated into the Senate and House Reports—described States' widespread reliance on nonvoting to initiate list-maintenance procedures but emphasized that "only a handful of states simply drop the non-voters from the list without notice." Senate Report 46; House Report 30. The CBO then observed that "*[t]hese states* could not continue this practice under [the NVRA]." *Ibid.* (emphasis added). That description is inconsistent with the more sweeping change required by the court of appeals' interpretation.

Second, the NVRA's supporters in Congress did not suggest that it would bar States from sending Section 20507(d)(2) notices based on registrants' failure to vote. To the contrary, although supporters emphasized that registrants should not be removed "*merely* because

they have failed to cast a ballot," Senate Report 17 (emphasis added), they noted that the NVRA would allow a removal if the registrant "has failed to respond to a notice * * * and has failed to vote or appear to vote in two Federal general elections," *id.* at 19; see House Report 16. Indeed, the Senate sponsor of the NVRA acknowledged that "nonvoting may be an indication that a registered voter has moved" and argued only that nonvoting "is not a *sufficient* reason for the removal of that person's name from the rolls." 137 Cong. Rec. 19,088 (1991) (Sen. Ford) (emphasis added); see *ibid.* (explaining that a predecessor bill with a provision materially identical to Section 20507(b)(2) "would prohibit the purging of a voter's name for the simple reason of failing to vote").

2. Allowing States to send Section 20507(d)(2) notices based on nonvoting is also consistent with the balance that Congress struck in the NVRA. Although Congress sought to "increase the number of eligible citizens who register to vote," it also sought "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. 20501(b)(1), (3) and (4). The latter goals reflected Congress's recognition that "[t]he maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud," Senate Report 18, and that "[i]naccurate registration lists are the bane of every election official" and "are extremely costly to the states, political parties, candidates and others who depend on them for effective voter contact," House Report 35-36 (citation omitted).

The safe-harbor process described in Section 20507(c) provides one cost-effective method for States to identify

registrants who have moved, but it has limitations. Among other things, it does not capture "the frequent occurrence of voters changing addresses without notifying the United States Postal Service." Pet. App. 42a; see *1998 FEC Report* 5-6. The safe-harbor process will thus inevitably "miss some registrants who no longer live at the address of record." *1998 FEC Report* 5-19.

States have responded to that problem by using a "variety of methods" in addition to or instead of the safe harbor process. Nat'l Ass'n of Sec'ys of State, *NASS Report: Maintenance of State Voter Registration Lists* 5-7 (Oct. 6, 2009). Some States, including Ohio, have made the judgment that the most appropriate way to maintain accurate voting lists is to use a registrant's failure to vote over a specified period as an indication that the registrant may have moved, and to seek to verify the registrant's residence using the procedure set forth in Section 20507(d). See Ga. Code Ann. § 21-2-234(a)(2) (Supp. 2017); Mont. Code Ann. § 13-2-220(1)(c)(iii) (2015); Okla. Stat. Ann. Tit. 26, § 4-120.2(A)(6) (West. Supp. 2017); 25 Pa. Cons. Stat. Ann. § 1901(b)(3) (West. 2007); W. Va. Code Ann. § 3-2-25(j) (LexisNexis 2013); see also Tenn. Code Ann. § 2-2-106(c) (2014) (superseded as of May 2, 2017). Under the flexible structure Congress adopted in the NVRA and clarified in HAVA, that judgment is left to the States. Cf. 52 U.S.C. 21085 ("The specific choices on the methods of complying with the requirements of" HAVA's list-maintenance provisions "shall be left to the discretion of the State.").

3. Finally, it bears emphasis that although the NVRA and HAVA do not prohibit States from sending Section 20507(d)(2) notices based on nonvoting, States' list-maintenance programs remain subject to a variety of safeguards. See, *e.g.*, 52 U.S.C. 20507(a)(1), (b)(1),

(c)(2), (d), and (e). Most notably, Congress specified that any list-maintenance program must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. 20507(b)(1). That requirement applies to "any activity that is used to start, or has the effect of starting, a purge of the voter rolls," and it serves "to prohibit selective or discriminatory purge programs" and to ensure that any such program is applied "to an entire jurisdiction." Senate Report 31.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 52 U.S.C. 20507 (Supp. III 2015) provides:

Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall—

(1) ensure that any eligible applicant is registered to vote in an election—

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than

the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of—

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.]; and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the

registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar

of the change of address prior to the date of an election, at the option of the registrant—

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election

official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include—

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an

offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not

each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means—

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

2. 52 U.S.C. 21083(a) (Supp. III 2015) provides:

Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election of-

ficial, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the com-

puterized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], including subsections (a)(4), (c)(2), (d),

and (e) of section 8 of such Act (42 U.S.C. 1973gg-6) [now 52 U.S.C. 20507].

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters—

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)) [now 52 U.S.C. 20507(a)(3)(B)], the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)) [now 52 U.S.C. 20507(a)(4)(A)], the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)) [now 52 U.S.C. 20503(b)], that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that—

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computer-

ized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

3. 52 U.S.C. 21145(a) (Supp. III 2015) provides:

No effect on other laws

(a) In general

Except as specifically provided in section 21083(b) of this title with regard to the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], nothing in this chapter may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws:

(1) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.].

(2) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.) [now 52 U.S.C. 20101 et seq.].

(3) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.) [now 52 U.S.C. 20301 et seq.].

(4) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.].

(5) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(6) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

4. Section 8(b) of the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 83, provides:

SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.

(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.]; and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

5. Sections 903 and 906 of the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1728, 1729-1730, provide:

SEC. 903. CLARIFICATION OF ABILITY OF ELECTION OFFICIALS TO REMOVE REGISTRANTS FROM OFFICIAL LIST OF VOTERS ON GROUNDS OF CHANGE OF RESIDENCE.

Section 8(b)(2) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-6(b)(2)) is amended by striking the period at the end and inserting the following: ", except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

"(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

"(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.".

SEC. 906. NO EFFECT ON OTHER LAWS.

(a) IN GENERAL.—Except as specifically provided in section 303(b) of this Act with regard to the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws:

(1) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

(2) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.).

(3) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.).

(4) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.).

(5) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(6) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

(b) NO EFFECT ON PRECLEARANCE OR OTHER REQUIREMENTS UNDER VOTING RIGHTS ACT.—The approval by the Administrator or the Commission of a payment or grant application under title I or title II, or any other action taken by the Commission or a State under such title, shall not be considered to have any effect on requirements for preclearance under section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) or any other requirements of such Act.

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No. 16-980

In The

Supreme Court of the United States

Jon Husted, Ohio Secretary of State,
Petitioner,

v.

A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of the American Civil Rights Union as *Amicus Curiae* in Support of Petitioner

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Interests of *Amicus Curiae*[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have agreed to the timely filing of *amicus* briefs.

Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections and preserving the Constitutional balance of state control over their own elections.

Summary of the Argument

Since 1994, Ohio has used a voter's inactivity as one basis for identifying ineligible registrants who will begin the removal process provided by the National Voter Registration Act of 1993 ("NVRA"). The Sixth Circuit held that this so-called "Supplemental Process" for removing ineligible registrants violates the NVRA because it considers a registrant's failure to vote as part of the removal process.

Contrary to the decision below, the NVRA does not categorically prohibit consideration of voter inactivity. When Congress exercised its power to regulate the removal of ineligible registrants, it did so narrowly and unambiguously, forbidding any removal based on "the failure to vote," 52 U.S.C. § 20507(b)(2), a prohibition later clarified by law to mean "*solely*" based on the failure to vote, 52 U.S.C. § 21083(a)(4) (emphasis added). Congress regulated no further.

Ohio does not remove any registrant "solely" by reason of a failure to vote. Rather, a registrant is removed only if she fails to respond to an address confirmation mailing and then fails to engage in any

voting activity for an additional four years—a procedure explicitly authorized by Congress under the NVRA. 52 U.S.C. § 20507(b)(2). This case can thus be decided in Secretary Husted's favor on statutory grounds, alone.

If, however, the NVRA indeed prohibits the States from utilizing inactivity as a factor that leads to deeming a registrant ultimately to be unqualified—as the lower court found—then the NVRA intrudes on the important federalist balance in the Constitution.

The Federal Constitution gives Congress limited power with respect to elections. Regulatory power concerning the "Times, Places, and Manner" of holding federal elections is preserved for the States under the Constitution's Elections Clause. U.S. Const., Art. I, § 4, cl. 1. In this area, Congress's power to regulate is superior to the States' power *only* when the regulations cannot be reconciled. That is, Congress's regulations "supersede those of the State which are inconsistent therewith." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("*ITCA*").

However, "[p]rescribing voting qualifications . . . forms no part of the power to be conferred upon the national government by the Elections Clause." *ITCA*, 133 S. Ct. at 2258 (citations and quotations omitted). Rather, the Constitution's Qualification's Clause gives the power to set voter qualifications to the States, exclusively. The power to set voter qualifications includes the power to enforce them. *Id.* at 2258-59.

This Court has not had the occasion to decide whether list maintenance programs are properly considered "qualification" regulations or "manner" regulations. However, the Court need not make that determination now, because the "Supplemental Process" is a valid exercise of authority under either classification.

The Sixth Circuit, by enjoining the "Supplemental Process," encroached on the Constitutional prerogatives of the State of Ohio. That decision cannot withstand scrutiny and should be accordingly reversed.

Argument

I. The NVRA and HAVA Permit Ohio's Supplemental Process.

Congress directed that the States must make a reasonable effort to remove registrants who have changed residency to a different voting jurisdiction. 52 U.S.C. § 20507(a)(4)(B), subject to certain constraints. The first constraint is general, but unambiguous. The NVRA prohibits the removal of registrants "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Congress, however, did not categorically prohibit the use of voter inactivity as a means to maintain clean voters rolls. In fact, Congress provided an explicit exception to the general constraint that actually depends on voter inactivity, explaining that "nothing in [Section (b)(2)] may be construed to prohibit a State from" removing a registrant if she (1) fails to respond to an address confirmation mailing, and then (2) fails to vote in two consecutive general elections. 52 U.S.C. §

20507(b)(2)(A)-(B); *see also* 52 U.S.C. § 20507(d)(1)(B).

In 2002, Congress passed the Help America Vote Act ("HAVA"), which clarified these list maintenance procedures:

> [C]onsistent with the National Voter Registration Act of 1993 . . . , registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added).

The Sixth Circuit made much of the fact that the NVRA uses different language than HAVA, referencing not just removals based "solely" on a failure to vote, but list maintenance programs that "result[]" in the removal of voters "by reason of the person's failure to vote." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016) (citing 52 U.S.C. § 20507(b)(2)). But this ignores that when Congress drafted HAVA to prohibit removals based "solely" by reason of a failure to vote, it carefully explained that this prohibition was "consistent with the National Voter Registration Act." 52 U.S.C. § 21083(a)(4). Thus, HAVA did not modify the NVRA, but clarified what it means.

Ohio does not remove any registrants "solely by reason of a failure to vote." *Id.* Rather, registrants are removed only if they (1) do not respond to the confirmation notice or update their registration; *and* (2) do not subsequently vote during a period of four

consecutive years that includes two federal elections." *A. Philip Randolph Inst.*, 838 F.3d at 703 (emphasis in original). In other words, Ohio's Supplemental Process expressly tracks what is permissible under the NVRA. 52 U.S.C. § 20507(b)(2). The Supplemental Process therefore can and should be upheld under a plain reading of the NVRA and HAVA.

II. The Sixth Circuit's Interpretation of the NVRA and HAVA Contravenes Established Principles of Federalism.

The lower court determination that the NVRA categorically prevents the States from considering voter inactivity as a means to determine voter eligibility implicates important constitutional concerns. Whether viewed under the Qualifications Clause or the Elections Clause, the Supplemental Process is a lawful exercise of Ohio's authority to regulate its elections for federal office.

A. The Constitution Grants the States the Power to Set Voter Qualifications and Decide the Manner In Which Ineligible Registrants are Removed From the Voter Rolls.

The regulation of federal elections is directed by the Constitution. Under the Qualifications Clause, the Framers reserved exclusively to the States the authority to control who may vote in federal elections. *See* U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures); *ITCA*, 133 S. Ct. at 2258 (quoting

Oregon v. Mitchell, 400 U. S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) ("'Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'")). In this area, the Constitution is clear: "[t]he Framers did not intend to leave voter qualifications to Congress." *ITCA*, 133 S. Ct. at 2263 (Thomas, J., dissenting).

The Framers also gave the States the authority to control how elections are conducted. The Elections Clause "imposes the duty ('*shall* be prescribed')" upon the States "to prescribe the time, place, and manner of electing Representatives and Senators." *ITCA*, 133 S. Ct. at 2253. This power is "broad" in scope, "embrac[ing] [the] "authority to provide a complete code for congressional elections." *Id.* (citations and quotations omitted).

While State authority over elections is the "default," the Framers empowered Congress to "pre-empt state legislative choices" with respect to the times, places and manner of holding elections. *Id.* The original purpose of giving Congress pre-emptive rights in this area was precise—it acted as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *ITCA*, 133 S. Ct. at 2253.

Where exercised, Congress's pre-emptive power has narrowly defined limits. Congressional action is superior to that of the States only "so far as it is exercised[] and *no farther*." *ITCA*, 133 S. Ct. at 2254 (emphasis added). That is, Congress's regulations "supersede those of the State which are inconsistent

therewith." *Id.* at 2254; *see also Ex parte Siebold*, 100 U.S. 371, 384 (1879) ("When exercised, the action of Congress, *so far as it extends and conflicts* with the regulations of the State, necessarily supersedes them.") (emphasis added). In short, where Congress has not explicitly acted, regulatory authority over federal elections remains the exclusive prerogative of the States.

B. Ohio's Supplemental Process is a Valid Exercise of Constitutional Authority and is Consistent with the NVRA and HAVA.

Whether list maintenance programs are properly considered "qualification" regulations or "manner" regulations is an open question. This Court has suggested that the Elections Clause encompasses regulations relating to "registration," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), but has more recently reserved that question for consideration, *ITCA*, 133 S. Ct. at 2259 n.9. However, the Court need not make that determination now, because the "Supplemental Process" is lawful exercise of Ohio's constitutional authority under either classification.

1. The Supplemental Process is Valid Under the Qualifications Clause.

The States' power to prescribe qualifications broadly includes the power to enforce them. *ITCA*, 133 S. Ct. at 2258-59. Residency is a voter qualification in Ohio. Ohio Rev. Code § 3503.01(A). The Supplemental Process enforces Ohio's residency requirement by requiring registrants who have not voted recently to confirm their eligibility to vote at their registered address.

To read the NVRA as preventing this enforcement mechanism would contravene Ohio's exclusive prerogative under the Constitution's Qualifications Clause to enforce voter qualifications. Indeed, as this Court said recently in *ITCA*, any law that "precluded a State from obtaining information necessary to enforce its voter qualifications" "would raise serious constitutional doubts." *Id.*

Only under "exceptional conditions," such those under which the Voting Rights Act of 1965 was passed, could justify such a "drastic departure from basic principles of federalism." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013). The Voting Rights Act "employed extraordinary measures to address an extraordinary problem"—"entrenched racial discrimination in voting." *Id.* No such circumstances exist here.

2. The Supplemental Process is Valid Under the Elections Clause.

Even if viewed as a "manner" restriction subject to the contours of the Elections Clause, the Supplemental Process remains a valid exercise of power granted to the States by the Constitution.

With respect to the "times, places, and manner" of federal elections, Congress's regulations "supersede those of the State which are inconsistent therewith," and "*no farther*." *ITCA*, 133 S. Ct. at 2253-54 (emphasis added). To go farther, would encroach into an area of regulation preserved for the States by the Framers, thereby upsetting the federalist balance enshrined in the Constitution.

In HAVA, there is clear direction from Congress that the NVRA has regulated "no farther," *ITCA*, 133 S. Ct. at 2254, than to prohibit registrant removal "solely by reason of a failure to vote," 52 U.S.C. § 21083(a)(4). Ohio does not remove any registrants "solely by reason of a failure to vote." *Id.* Instead, Ohio *sends notices* to registrants who have not voted in two years asking that they confirm their registered address. Only if a registrant does not respond to the notice *and* does not vote during a period of four consecutive years that includes two federal elections, is the registrant's registration cancelled.

Of course, if a State removes a registrant both because the registrant has failed to respond to a notice and because the registrant has failed to vote, the State has not removed the registrant *solely* because the registrant has failed to vote.

Importantly, Congress was silent as to how States may determine which registrants receive the address confirmation notice described in the NVRA. In other words, there is no inconsistency between federal and state regulation with respect to that determination. Congress's silence means that such a determination remains within the realm of the States' authority under, at least, the Constitution's Elections Clause. *ITCA*, 133 S. Ct. at 2254 (With respect to the "Times, Places and Manner" of federal elections, Congress's regulations "supersede those of the State *which are inconsistent therewith.*") (emphasis added).

As this Court is aware, issues of constitutional interpretation are weighty and should not be

reached absent the "necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). That necessity is lacking here because this Court can and should find that the NVRA and HAVA permit Ohio's Supplemental Process.

However, should this Court be unable to resolve this case on statutory grounds, established principles of federalism demand that this case be resolved in favor of Secretary Husted.

III. Additional Voter Removal Tools, Like Ohio's Supplemental Process, Are Available to Election Officials and Are Necessary to Combat the Problem of Corrupted Voter Rolls Nationwide.

The current state of the nation's voter rolls is dismal. A recent study by Pew Charitable Trusts found that "approximately 24 million—one of every eight—voter registrations in the United States are no longer valid or are significantly inaccurate." The Pew Center on the States, *Inaccurate, Costly, and Inefficient, Evidence That America's Voter Registration System Needs an Upgrade*, February 2012, *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.

A 2015 investigation by the Public Interest Legal Foundation (PILF) found that 141 counties in 21 states have more people registered to vote than living, voting-age residents. Press Release, PILF, *141 Counties Have More Registered Voters Than People Alive* (August 27, 2015), *available at*

https://publicinterestlegal.org/blog/scores-of-counties-put-on-notice-about-corrupted-voter-rolls/.

A Virginia-focused investigation conducted by PILF in May 2017 revealed that over 5,500 registered voters had been removed for citizenship defects in the Commonwealth since 2011. PILF, *Alien Invasion II: The Sequel to the Discovery and Cover-up of Non-citizen Registration and Voting in Virginia* at 1 (May 29, 2017), *available at* https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf. A portion of these individuals cast nearly 7,500 ballots before election officials removed them from the voter rolls. *Id.*

Despite great advances in technology, most jurisdictions fail to use the latest database tools at their disposal and ignore best practices in their list maintenance activities. *See* PILF, Best Practices for Achieving Integrity in Voter Registration, available at https://publicinterestlegal.org/files/PILF-best-practices-report-FINAL.pdf. The mobility of the nation's population and the influx of non-citizens have certainly made the job of maintaining voter lists more difficult. However, the NVRA's goal of ensuring accurate and current voter registration rolls cannot be disregarded simply because the task has become more challenging. To the contrary, present circumstances require election officials to find new and creative ways to police their voter rolls.

The NVRA requires election officials to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters...." 52 U.S.C. § 20507(a)(4)(B). Congress did not include a detailed

checklist of steps within the NVRA for election officials to follow. Rather, Congress provided election officials wide flexibility to implement a generalized program to keep voter rolls clean. 52 U.S.C. § 20501(b) (Congress enacted the NVRA "to protect the integrity of the electoral process . . . and to ensure that accurate and current voter registration rolls are maintained.").

The current state of the voter rolls across the nation demonstrates the need for election officials to utilize the flexibility afforded by Congress under the NVRA. Ohio's use of voter inactivity to begin the removal process permitted under the NVRA is one example of where this is taking place. Other states should be encouraged to take similar and even further action to protect the sanctity of our nation's elections.

It is the responsibility of election administrators to use the list maintenance tools reasonably available to mitigate the potential for any registration or voting fraud. Irregularities and inflated rolls may lower voter confidence in the fairness and accuracy of elections. The end goal should be for all political parties and candidates to be confident that the winners and losers were correctly determined and the contest was conducted fairly. That requires an accurate voter registration list before anything else.

Conclusion

Ohio's Supplemental Process is a valid exercise of authority preserved in the Constitution. The Sixth Circuit's decision contravenes that authority. The

decision below should be reversed in order to reaffirm the State's constitutional authority to regulate the registration and removal of voters so it may address the serious and increasingly prevalent issue of corrupted voter rolls.

Respectfully submitted,

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMERICAN HISTORY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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LEGLISLATIVE MATERIALS

H.R. Rep. No. 101-243 (1989) 17

H.R. Rep. No. 103-9 (1993) ..... *passim*

H.R. Rep. No. 107-329, pt. 1 (2001) 30

H.R. Rep. No. 107-730 (2002) (Conf. Rep.) 6, 31

S. Rep. No. 101-140 (1989) 16, 17

S. Rep. No. 103-6 (1993) ..... *passim*

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Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin., 101st Cong. (1989) 19, 20, 22

OTHER AUTHORITIES

Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483 (1988) 12, 13, 16

TABLE OF AUTHORITIES—Continued

Page(s)

Committee for the Study of the American Electorate, *Creating the Opportunity: How Voting Laws Affect Voter Turnout* (Oct. 1987) 16

Chandler Davidson, *The Voting Rights Act: A Brief History, in Controversies in Minority Voting: The Voting Rights Act in Perspective* (Bernard Gofman & Chandler Davidson eds., 1992) 7

Federal Election Commission, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* (Mar. 1998) 29

Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League, in* Supplement to National Municipal Review (Jan. 1927) 9, 10

Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League*, Supplement to National Municipal Review (1931) 8, 12

Joseph P. Harris, *Legislative Notes and Reviews*, 22 Am. Pol. Sci. Rev. 349 (1928) 8, 10

TABLE OF AUTHORITIES—Continued

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Joseph P. Harris, National Municipal League, *Model Voter Registration System* (4th ed. 1954 & rev. 1957) 10

Joseph P. Harris, *Registration of Voters in the United States* (1929) 9, 11

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J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of One-Party South, 1880-1910* (1974) 7

Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277 (1993) 13

Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 Conn. L. Rev. 372 (1975) ..... *passim*

National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001), http://web1.millercenter.org/commissions/comm_2001.pdf 7

TABLE OF AUTHORITIES—Continued

Page(s)

National Municipal League, *A Model Election System* (1973) 11, 12

Report of the President's Commission on Registration and Voting Participation (1963) 11, 12

John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* (1988) 8

Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453 (2008) 7

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Leonard D. White, *Public Administration, 1927*, 22 Am. Pol. Sci. Rev. 339 (1928) 10

INTERESTS OF *AMICUS CURIAE*[1]

Amici curiae are professors who focus their academic research and teachings on American history, and in particular voting rights and elections. *Amici* bring their objective expertise to this case and have no personal stake in its outcome. As students and teachers of history, *amici* believe that Petitioner's arguments are wrong in part because they are profoundly ahistorical. This Court has aptly observed on a number of occasions that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), and this case is no exception. *Amici* submit this brief to describe the history of state laws that purged the names of voters from voter registration lists because those people failed to vote—from their rise in the early twentieth century to their ultimate and absolute rejection by Congress when it passed the National Voter Registration Act of 1993.[2]

The scholars joining this brief include:

- Orville Vernon Burton, Professor of History, Clemson University.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] All signatories speak for themselves only and not on behalf of their respective institutions. Institutional affiliations are listed for identification purposes.

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SUMMARY OF ARGUMENT

This case is about voting, a right "at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The franchise has expanded throughout our history via constitutional amendments and federal legislation, as well as shifting norms and attitudes. *See id.* at 555 & n.28. Even so, elections too often are marred by low voter turnout, a problem exacerbated by state practices that burden registration and reduce access to the polls. In this case, Petitioner, the Ohio Secretary of State, defends one such practice. Ohio's Supplemental Process automatically cancels the registration of everyone who has not voted in two years and then fails to respond to a single notice and vote in the ensuing four years. Purging residents in this way for exercising their right *not* to vote violates federal law, regardless of whether the State provides notice and an opportunity to challenge removal. Respondents explain why that is so under the plain text of the relevant statute. *Amici* agree and seek here to place that text in its historical context. The Court should reject Petitioner's contrary revisionist history and affirm the Sixth Circuit's decision below.

In the early twentieth century, state and local governments increasingly began purging the names of citizens who failed to vote as an imprecise but inexpensive way to keep voter rolls accurate. Substantial "dead wood" on voter rolls, the theory went, made for inaccurate registration lists that might enable the likes of Tammany Hall to pad votes. The working assumption behind these purging practices was that people who did not vote in a jurisdiction failed to do so because they had lost their voting eligibility in that jurisdiction—perhaps they moved away, died, or

were convicted of a crime. And even if that assumption proved incorrect in any particular case (*i.e.*, the person in fact remained eligible to vote in that jurisdiction), proponents asserted that the affected person could either prevent the purge from going into effect (assuming that the person received advance notice) or reregister (assuming that the person understood reregistration was an option). None of that is to say that these purges were innocent—historians like *amici* have since found that in many cases registration systems and purging practices had both the intent and effect of disfranchising voters, particularly African-American voters. Nevertheless, many States agreed with the early proponents of these laws and adopted purging for non-voting as a quick-and-easy method to clean up voter registration lists. But over time even once-proponents of purging for failure to vote came to see the shortcomings of this practice, and Congress ultimately banned the practice entirely.

Mounting experience with these purging practices generated concerns about their efficacy and fairness. Many who studied the causes of low voter turnout in the United States concluded that cumbersome state registration laws—including purging for non-voting—were among the primary culprits. Critics also cited evidence showing that these laws disproportionately impacted poor and minority voters. Courts joined the fray as well. The Michigan Supreme Court, for example, questioned the logic of using failure to vote as a proxy for voter ineligibility when the "absence of baby-sitters" or the conscious exercise of the *right not to vote* were equally plausible explanations for someone sitting out an election. *Michigan State UAW Cmty. Action Program Council (CAP) v. Austin*, 198 N.W.2d

385, 388 (Mich. 1972). And the Fifth Circuit exposed a dark underbelly of the practice in a case where a local election official violated federal law by applying Louisiana's purge process in a racially discriminatory manner against African Americans. *Toney v. White*, 476 F.2d 203, 205-06, 208 (5th Cir.), *vacated in part on reh'g en banc*, 488 F.2d 310 (5th Cir. 1973).

In the late 1980s, Congress addressed concerns over state laws that purged registrants for non-voting when it tackled comprehensive voting rights and election law reform. Over the course of several years of hearings, Congress heard from numerous groups about the need to reform the complex maze of state and local voter registration laws to increase citizen participation in the voting process. At the same time, state and local officials testified about their legitimate need to maintain accurate voter registration lists.

The result was the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 ("NVRA"), which struck a balance between these competing interests. This balance came out against the continued use of purge laws based on failure to vote—regardless of whether the laws allowed for extended time periods to measure non-voting and regardless of whether they provided notice and an opportunity to challenge before an individual was removed from a registration list. Congress recognized that purging for non-voting was a relatively common practice, and that States had a legitimate interest in maintaining accurate voter registration lists. Congress simply decided that a person's failure to vote should not be used to achieve that goal. Congress directed States instead to use more precise and less discriminatory methods for identifying ineligible voters, including the National

Change of Address program available through the U.S. Post Office.

Amici are not alone in this understanding of the text and purpose of the NVRA. The United States had—and over two decades consistently advocated—precisely the same understanding, from the moment Congress passed the NVRA until this late stage of this case. That understanding of the NVRA was, and remains today, correct, the Government's recent about-face notwithstanding.

That understanding, moreover, has not been superseded legislatively. When Congress passed the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 ("HAVA"), it did not resurrect the ability of States to purge voters who failed to vote. To the contrary, Congress explicitly intended that HAVA "leave[] NVRA intact, and ... *not undermine it any way*." H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.) (emphasis added).

ARGUMENT

I. Purging For Non-Voting Was Justified As A Measure To Keep Accurate Voter Rolls, But The Practice Raised Profound Concerns

State and local barriers to voting have taken many forms over time. In innumerable well-documented cases, state and local officials created flagrant obstacles to voting designed to disenfranchise minority groups, particularly African Americans. Congress admirably fought against those obstacles through numerous pieces of federal legislation, most notably the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15 (1966).

The practice of purging for non-voting was not always driven by any overtly discriminatory animus. As Petitioner recounts, these and other purge practices emerged as a means to maintain accurate rolls when States and municipalities shifted away from periodic voter registration systems to permanent voter registration systems in the early 1900s. *See* Pet'r Br. 3 (citing National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001), http://web1.millercenter.org/commissions/comm_2001.pdf).

But that is only part of the story. Petitioner ignores the evidence that in many cases these voter registration systems themselves also "served—and often were intended to serve—as a means of keeping African-American, working-class, immigrant, and poor voters from the polls." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 312 (2000); *see also* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 10 (Bernard Gofman & Chandler Davidson eds., 1992) (describing "statutory suffrage restrictions" as a means to disfranchise African Americans); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of One-Party South, 1880-1910* at 47-50 (1974) (describing registration laws, and particularly the discretion afforded to registrars, as a means for disfranchising African-American voters); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 457 (2008) ("There was often an ulterior motive for these laws as well, namely to impede the participation of groups that those

running elections wanted to exclude."). "[T]he devil was in the details," Keyssar, *supra*, at 312, and purging often was driven by discriminatory animus and had discriminatory effects. *See* J. Morgan Kousser, *Colorblind Injustice* 34 (1999) (describing purging as a practice used to "keep[] the black vote under control" in the nineteenth century); John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* at 142, 146 (1988) (discussing a 1911 New Jersey law that, among other things, required voters who missed an election to reregister and reportedly led to 800 of Trenton's 1,000 black voters being removed from the registry).

In any event, the shift to permanent registration systems certainly created a perceived need to clean voter registration lists of the names of individuals no longer eligible to vote in that jurisdiction. *See* Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League*, Supplement to National Municipal Review 7 (1931) ("Nat'l Mun. League 1931 ed."); *see also* Joseph P. Harris, *Legislative Notes and Reviews*, 22 Am. Pol. Sci. Rev. 349, 349 (1928). Otherwise, any benefits in efficiency and convenience resulting from permanent registration systems could be substantially offset by inaccurate voter rolls and a generalized fear of voter fraud by political machines. Nat'l Mun. League 1931 ed., at 37-38; Harris, *Legislative Notes*, *supra*, at 349-51.

The question therefore became how to achieve most effectively the goal of bona fide voter registration lists. In 1927, the National Municipal League published *A Model Registration System*, a report that provided "best" practices already in use in some jurisdictions

that, at least according to the National Municipal League, other States and cities should adopt. Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League*, *in* Supplement to National Municipal Review 45-48, 77-83 (Jan. 1927) ("Nat'l Mun. League 1927 ed."). In Boston, for example, the local police conducted a census of adult residents and compared the results to registration records. *Id.* at 78, 80-81. Death reports were another "very practical and effective means" of keeping voter registration lists current. *Id.* at 78.

Among these "best" practices, the National Municipal League recommended that a person's failure to vote in recent elections should be used as a basis for removing ineligible individuals from voter registration lists. *Id.* at 78-79. Cities like Denver, Colorado and Portland, Oregon, for instance, depended exclusively on this method to the exclusion of all others because of its certain effectiveness in identifying every voter who died or moved away. *Id.* at 79; Joseph P. Harris, *Registration of Voters in the United States* 225-26 (1929) ("Other methods fail to catch some electors who have died or moved away, but all are caught by a system of cancellation for failure to vote."). Because of their efficiency, the National Municipal League advocated for the adoption of practices like these that purged those who failed to vote in a one- or two-year period, or in a general election, provided the voters received notice and an opportunity to seek reinstatement. Nat'l Mun. League 1927 ed., at 78-79. Such measures, in the National Municipal League's view, "place[d] a mild penalty upon non-voting and

thereby stimulate[d] voting," and would "not greatly inconvenience[]" those who failed to vote. *Id.* at 79.

Bills inspired by the National Municipal League's recommendations were introduced in seven States immediately thereafter. *See* Leonard D. White, *Public Administration, 1927*, 22 Am. Pol. Sci. Rev. 339, 344 (1928) (describing the National Municipal League's model registration system as the "most important event in this field during 1927"); Harris, *Legislative Notes*, *supra*, at 352. By 1939, twenty States had laws on the books mirroring all or part of the *Model Registration System*, *see* O. Douglas Weeks, *Permanent Registration of Voters in the United States*, 14 Temp. L.Q. 74, 75-76 (1939), and by the 1970s, fully thirty-eight States plus the District of Columbia purged citizens from voter registration lists based on failure to vote. *See* Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 Conn. L. Rev. 372, 373-78 (1975); *see also* Joseph P. Harris, National Municipal League, *Model Voter Registration System* 44 (4th ed. 1954 & rev. 1957) ("Cancellation for failure to vote is the principal means used in most permanent registration jurisdictions to purge the lists.").

Each of these laws permitted cancellation of registrations for failure to vote, though they differed in certain respects, most notably (1) the time period used to track a person's voting inactivity, and (2) the notice (or lack thereof) provided to a person whose name had been or would be purged. *See* Weeks, *supra*, at 84-85; Menchel, *supra*, at 373-78. Some laws considered a failure to vote within two years; others four years or more; some laws provided no notice; others provided notice with a limited window to challenge removal or seek reinstatement, and yet another provided multiple

notices before purging went into effect. *See* Weeks, *supra*, at 84-85; Menchel, *supra*, at 373-78. In all cases, people could reregister if their names were purged from the voter registration lists. *See* Harris, *Registration of Voters*, *supra*, at 224-25; Menchel, *supra*, at 376-77.

But as these laws took hold, questions emerged about their wisdom. Voter participation rates in the United States lagged well behind those in other developed democracies. *See Report of the President's Commission on Registration and Voting Participation* 7-9(1963) ("*1963 Report*"). Groups that studied the voter participation problem, like the President's Commission on Registration and Voting in 1963, blamed "[r]estrictive legal and administrative procedures in registration and voting [that] disfranchise millions." *Id.* at 1. The Commission highlighted the fundamental unfairness that results when "[a]n unexpected business trip or a broken ankle can deprive a citizen of his right to vote," and when that failure to vote two years ago means the person "cannot vote now." *Id.* at 11.

The National Municipal League voiced similar concerns in 1973. National Municipal League, *A Model Election System* 1 (1973) ("Nat'l Mun. League 1973 ed.") ("[T]he problem of non-voting in America is directly related to the machinery states have created for registering voters and administering elections."). "Frequent purges will result in more current and accurate lists," the National Municipal League explained, "but they also increase the volume of registrations that officials must process and may seriously inconvenience voters. What the system

confers at one point, it often takes away later." *Id.* at 24.

Both the President's Commission on Registration and Voting and the National Municipal League agreed that States should never cancel a person's registration for failure to vote for any period less than four years, if they did so at all. *See 1963 Report* 37; Nat'l Mun. League 1973 ed., at 33. Indeed, the National Municipal League went so far as to call laws with shorter non-voting periods "discriminatory and undesirable" because they disproportionately affected the large number of people who voted only in presidential elections. Nat'l Mun. League 1973 ed., at 33. The National Municipal League more generally described cancellation for non-voting as a flaw of permanent registration systems that required citizens to constantly reregister and thus called into question their "permanent" label—a stark shift from its previous longstanding support for aggressive purging. *Compare id.* at 4, *with* Nat'l Mun. League 1931 ed., at 38-39. The National Municipal League now recommended that States primarily use door-to-door canvassing, not purging for non-voting, to keep registration lists clean. Nat'l Mun. League 1973 ed. at 24-34 (recommending voter purge laws based on inactivity only for "States which do not implement a door-to-door canvassing system").

Critics also questioned the core assumption underlying purging for non-voting—that a person's failure to vote was a reliable indicator of their ineligibility to vote. *See* Menchel, *supra*, at 373, 393; Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 508 (1988). According to these

critics, that assumption had little validity in States that purged the names of voters who merely failed to vote for two years or in one general election. *See* Menchel, *supra*, at 373. The assumption also lost persuasive force in States that gave voters inadequate notice before their registrations were cancelled. In Missouri, for example, residents of St. Louis County who received a notice were not told they had the right to reregister if they failed to challenge the purge within twenty days, but residents of Jackson County were. *Id.* at 375; *see also* Barber, *supra*, at 501.

Critics further pointed out that the poor and minority groups were disproportionately affected by these purges both because they voted less frequently and because they had greater difficulty navigating reregistration once their registrations were purged. *See* Barber, *supra*, at 491-92 (discussing a statistical study of voters in Arizona showing that Mexican Americans turned out less frequently in midterm elections and concluding they would be disproportionately impacted by a two-year purge for failure to vote); Menchel, *supra*, at 392 ("The lower the level of education, the more likely the voter will be, or view himself as being, unable to register."); *see also* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1327-28 (1993) ("[P]eople who are literally struggling to find enough to eat are highly unlikely to participate in the political process. . . . The politically quiescent attitude of the poor, therefore, is less a matter of free choice, than of the mutually reinforcing effects of low resources, weak political incentives, and inadequate skills that trap the poor in . . . a cycle of defeat." (citations and internal quotation marks omitted)).

Litigants and judges hashed out these questions, too. Challengers argued that these purge laws were invalid under the U.S. and applicable state constitutions. Courts often disagreed, holding that the laws reasonably related to the legitimate state interest of preventing voter fraud. *See, e.g., Simms v. Cty. Ct.*, 61 S.E.2d 849, 851-54 (W. Va. 1950); *Citizens' Comm. for the Recall of Jack Williams v. Marston*, 507 P.2d 113, 116-17 (Ariz. 1973); *Duprey v. Anderson*, 518 P.2d 807, 810-11 (Colo. 1974); *see also Hoffman v. Maryland*, 928 F.2d 646, 648-49 (4th Cir. 1991) (upholding Maryland's voter purge statute).

But in some cases, judges identified critical weaknesses in these laws. In *Michigan State UAW Community Action Program Council (CAP) v. Austin*, the Michigan Supreme Court struck down that State's purge law with a two-year voting inactivity trigger because the law affected the right to vote protected by the Michigan Constitution and lacked a compelling government interest. *See* 198 N.W.2d 385, 390 (Mich. 1972); *see also* Menchel, *supra*, at 381-82. In doing so, the court questioned the validity of using a person's failure to vote as a proxy for identifying ineligible voters because so many other explanations existed for non-voting, "including illness, travel, absence of baby-sitters, or a conscious protest against all of the candidates in a particular election." *Michigan State UAW*, 198 N.W.2d at 388. That logical flaw had profound real-world consequences given the sheer number of registrations purged under the Michigan law. From 1960 to 1970, *over 600,000* registrations were cancelled for non-voting in the city of Detroit alone. *Id.*

The Fifth Circuit confronted a different problem in *Toney v. White*. *See* 476 F.2d 203 (5th Cir. 1973), *vacated in part on reh'g en banc*, 488 F.2d 310 (5th Cir. 1973); *see also* Menchel, *supra*, at 386. There, a local registrar had discriminated against African-American voters by publishing a notice that 141 voters' names would be purged for non-voting without informing the named individuals of their right under Louisiana law to appear before the registrar and prove their right to remain registered. *Toney*, 476 F.2d at 205-07. Of the 141 affected voters, 130 were African American. *Id.* at 206. The court concluded that this, along with other discriminatory actions, violated the Fifteenth Amendment and the Voting Rights Act. *Id.* at 208.

Even the divided decision of a three-judge district court in *Williams v. Osser* that upheld purging for non-voting exposed significant problems with these laws. *See* 350 F. Supp. 646 (E.D. Pa. 1972); *see also* Menchel, *supra*, at 383-85. In *Williams*, the challengers of Pennsylvania's purge law presented uncontested and statistically valid evidence showing that 58.5% of people removed from voter rolls for non-voting had not actually moved, been convicted of a felony, or died and were thus eligible to vote. 350 F. Supp. at 649-50. Worse yet, fewer than half of those people took action to reregister after they were purged. *Id.* The court nevertheless upheld the Pennsylvania law because it concluded the law was rationally related to the state interest of preventing voter fraud and, in the court's view, imposed only a "minimal" burden on voters. *Id.* at 653. Viewing the statistical evidence, a dissenting judge concluded that "[i]t is quite clear . . . that non-voting for two years is not a valid indicator of non-residence" and would have found the law

unconstitutional under a more demanding level of scrutiny. *Id.* at 654-55 (Luongo, J. dissenting).

So matters stood in the late 1980s, when American voter turnout hit historical lows. Voter participation in the 1986 midterm elections fell to its lowest in over four decades, with 112,000,000 eligible citizens failing to vote. *See* Committee for the Study of the American. Electorate, *Creating the Opportunity: How Voting Laws Affect Voter Turnout* 3 (Oct. 1987). The Committee for the Study of the American Electorate, a nonprofit and nonpartisan group guided by public officials and scholars, published a report raising the alarm about the "appalling and embarrassing" voter turnout figures that illustrated "a growing crisis for American democracy." *See id.* at 3; *id.* at 5 ("Simply and bluntly, government of, for and by the people is in danger of becoming government of, for and by the few."). The Committee did not mince words when it came to purges based on voter inactivity. It found this practice was "a major impediment to voting" and concluded that ending the practice would substantially enhance voter turnout. *See id.* at 77, 86-87.

By this point, forty States and the District of Columbia had laws on the books that purged individuals for non-voting, *see* Barber, *supra*, at 499, and concerns about low voter participation, caused at least in part by these purging laws, abounded. *See Creating the Opportunity*, *supra*, at 77, 86-87; *cf.* Keyssar, *supra*, at 312-13.

II. Congress Acted To End The Practice Of Purging Citizens From Registration Lists For Non-Voting When It Passed The NVRA

The dismal voter turnout to the 1988 presidential elections spurred Congress into action. *See* S. Rep. No.

101-140, at 4 (1989). By the late 1980s, Congress had considered an array of potential federal legislation aimed at increasing the number of eligible citizens registered to vote. *See, e.g.*, H.R. Rep. No. 101-243 (1989); S. Rep. No. 101-140. Congress appreciated that because the "failure to become registered is the primary reason given by eligible citizens for not voting," making registration more accessible was critical to increasing voter participation. *See, e.g.*, H.R. Rep. No. 103-9, at 3 (1993); *see also* S. Rep. No. 103-6, at 2 (1993). At the same time, Congress recognized that any new federal legislation should "minimiz[e] potential new problems for State and local election officials," *Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 100th Cong. 32 (1988) (hereinafter *1988 Hearings*) (statement of Rep. Swift), "protect the integrity of the political process," and "assure an accurate and current voter registration roll," S. Rep. No. 103-6, at 1. Congress's legislative efforts to achieve these sometimes-competing goals culminated in the NVRA.

Congress's first stated goal in passing the NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office." *See* 52 U.S.C. § 20501(b)(1). It aimed to accomplish this on the front end by reforming state voter registration processes to reduce government-imposed barriers to registration. *See e.g.*, H.R. Rep. No. 103-9, at 3; *see also* 52 U.S.C. §§ 20504-20506 (requiring that States allow citizens to register to vote simultaneously with a driver's license application, by mail, and in person). At the same time, Congress recognized that, on the back end, some of the methods States were using to

maintain voter rolls were stripping eligible voters from registration lists, often in a discriminatory fashion. *See* H.R. Rep. No. 103-9, at 5, 15; S. Rep. No. 103-6, at 3, 17-18. In particular, testimony and evidence presented to Congress confirmed that laws that purged individuals based on their failure to vote were likely to remove eligible voters from voter registration lists, directly frustrating Congress's commitment to increase voter registration numbers.

To address that problem, Congress included in the NVRA an express provision prohibiting state practices that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Having recognized that a person's failure to vote is not a fair or accurate proxy for voter ineligibility, Congress required a State to obtain some other, independent evidence suggesting that a voter was ineligible prior to taking steps to purge a particular voter. The Act's text, history, and purpose establish that Congress intended to eliminate purge practices triggered by a failure to vote.

A. Congress Was Concerned Over The Effect Of Non-Voter Purges On Voter Participation

The legislative history of the NVRA echoes the very same concerns about fairness and efficacy that critics of voter-inactivity purges had been raising for decades. When considering the various bills that eventually resulted in the NVRA, Congress carefully weighed evidence that state purges of non-voters too often resulted in the removal of *eligible* voters from registration lists, thereby improperly reducing the

number of voters able to vote in a given election. *See, e.g., 1988 Hearings*, at 285, 306, 379-80 (*Creating the Opportunity, supra*). Central to this issue was the question of whether an individual's failure to vote was reliable evidence that the voter had moved, died, or otherwise become ineligible to vote.

Evidence and testimony presented to Congress established the important (if unremarkable) fact that an individual's failure to vote often was explained by a number of reasons that had nothing at all to do with their continued eligibility to vote. The League of Women Voters, for example, provided the House Subcommittee on Elections with a litany of reasons why a voter might decline to vote in a given election, which included "lack of interest in or confusion about a particular election, disbelief that the issues presented will adequately represent one's concerns or that the candidates are worthy of one's support, inaccessibility of the polling place, absence, emergency, [and] health." *Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 101st Cong. 149 (1989) (hereinafter *1989 Hearings*) (statement of Nancy M. Neuman, President, League of Women Voters of the United States); *see also e.g., id.* at 49 (statement of Rep. John Conyers, Jr.) (explaining that "there are many reasons non-voters do not participate: some are apathetic; some feel that existing choices do not offer answers; others do not feel their vote will make a difference").

In addition, a report submitted to Congress by the Citizens' Commission on Civil Rights indicated that "the pool of non-voters who make *conscious decisions not to vote* for a number of reasons ... has grown dramatically since the 1960s." *1988 Hearings*, at 51

("Barriers to Registration and Voting: An Agenda for Reform") (emphasis added). The Reverend Jesse Jackson remarked upon the fundamentally undemocratic nature of purging such conscious objectors on the basis of their failure to vote, noting that "[n]o other rights guaranteed to citizens are bound to the constant exercise of that right." *1989 Hearings*, at 135 (testimony of Rev. Jesse Jackson, President, National Rainbow Coalition). Mr. Jackson explained: "We do not lose our right to free speech because we do not speak out on every issue. By the same token, we should not lose our right to vote because of our refusal to vote in any particular election." *Id.* Congress agreed:

> [W]hile voting is a right, people have an equal right not to vote, for whatever reason. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election.

S. Rep. No. 103-6, at 17.

The many possible alternative explanations for an individual's failure to vote thus called into question both the wisdom and the suppressive effect of using an individual's non-voting status as evidence that the voter may have moved, passed away, or otherwise become ineligible to vote. The Committee for the Study of the American Electorate presented evidence to Congress demonstrating that the state practice of using inactivity as a proxy for ineligibility "ha[d] a

serious negative effect on turnout" because it eliminated as many as *two million individuals* from voter rolls who would otherwise have been eligible to vote. *1988 Hearings*, at 306 (*Creating the Opportunity, supra*). The Committee therefore recommended that "in pursuing their legitimate responsibilities to provide accurate voting lists, [States] should seek other methods to cleanse the lists of those who have died or moved." *Id.*

The NVRA's legislative history also reveals concerns that non-voting purges might disproportionately affect minority voters. Congress understood that, historically, "selective purges" were akin to the "poll tax[es], literacy tests, [and] residency requirements" that state and local jurisdictions had used to "discourage [the] participation" of minorities in the electoral process throughout the nineteenth and early twentieth century. H.R. Rep. No. 103-9, at 2-3; *see also* S. Rep. No. 103-6, at 3. Though Congress appreciated that contemporary state purge practices were not likely fueled by the same discriminatory animus as their historical predecessors, Congress recognized that purges for non-voting could continue to "disproportionately affect persons of low incomes, and blacks and other minorities." *See* S. Rep. No. 103-6, at 17-18.

Congressional testimony confirmed that state registration laws were "not uniform," "not nondiscriminatory" and, in some cases, were "interpreted in such a manner as to deny eligible citizens their right to vote." H.R. Rep. No. 103-9, at 4. In particular, a number of interest groups voiced specific concerns about the impact of state non-voter purge laws on minority participation in the democratic

process. For example, the NAACP testified before Congress that "there should be *no* non-voting purges" because "[i]n many instances of non-voting purges blacks are disproportionately purged because of their infrequency of voting." *1989 Hearings*, at 153 (statement of Althea T.L. Simmons, Director, Washington Bureau, NAACP); *see also id.* at 154 (testimony of Pamela Monroe Young, Legal Director, NAACP).

The League of Women voters similarly expressed "concern[] about 'purging' procedures used in many states, especially those that automatically remove voters' names from the list for not voting in a specified number of elections." *Id.* at 149 (statement of Nancy M. Neuman). The League noted that in New York City 350,000 names were removed from the lists for non-voting before the April 1988 presidential primary, "effectively negating the accomplishments of a city-wide voter registration drive that had added 350,000 new names to the rolls." *Id.* And another 312,000 people were sent purge notices in February of 1989. *Id.* The League strongly urged that "no voter's name should be removed from the list of registered voters for not voting." *Id.*

In sum, the legislative history of the NVRA reflects serious and pervasive concerns—raised both by those testifying before Congress and by Congress itself—about the propriety of removing citizens from voter rolls based on their failure to vote. Congress understood that the continued use of that practice contributed to the substantial voter turnout problem in the United States, particularly among African Americans and other minority groups.

B. Congress Prohibited States From Considering Non-Voting In A Registrant Removal Process Except To Confirm Independent Evidence Of Voter Ineligibility

In light of these concerns, Congress included in the NVRA an express prohibition against state practices that "*result in the removal of the name of any person* from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote.*" 52 U.S.C. § 20507(b)(2) (emphasis added) ("Failure-to-Vote Clause"). Ohio's Supplemental Process violates that prohibition. Under the Supplemental Process, if an Ohio resident fails to vote in a single election cycle, they are sent a notice requesting their response. *See* Pet'r Br. 11. If the voter does not respond to that solitary notice and does not vote within the next four years, their voter registration is canceled. *Id.* Any such process that can "result" in a voter being removed from the from Ohio's voter rolls "by reason of [their] failure to vote," is impermissible under the NVRA. *See* 52 U.S.C. § 20507(b)(2).

Petitioner argues that the Supplemental Process does not violate the NVRA because it only prohibits States from "removing" registrants on the basis of their failure to vote—*i.e.*, that it does not prohibit States from using the failure to vote as a "trigger[]" for a notice-confirmation process. *See* Pet'r Br. 25-26. The NVRA makes no such distinction. To the contrary, the text broadly prohibits "*[a]ny state program or activity*" that "*result[s] in*" purging "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). The trigger for non-voting is itself a

"program or activity" that "results in" purging for non-voting and thus falls under the NVRA's prohibition.

The legislative history confirms that this statutory prohibition applies to the entire voter-removal process, from start to finish. In addition to subsection (b)(2)'s prohibition against any "program or activity" used to regulate voter registration rolls that results in purging individuals for their failure to vote, Section 8(b) includes—at subsection (b)(1)—an affirmative requirement that such "program[s] or activit[ies]" must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *Id.* § 20507(b)(1). The House Report explains that "the intent of this section [is] to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity *that is used to start, or has the effect of starting, a purge of the voter rolls*, without regard to how it is described or to whether it also may have some other purpose." H.R. Rep. No. 103-9, at 15 (emphasis added); *see also* S. Rep. No. 103-6, at 32 (same); *id.* at 19, 32 (explaining that use of address change information from the National Change of Address Program as a "trigger" is uniform and nondiscriminatory). Subsection b(1) therefore regulates every chronological step in a State's voter removal process, including the "*activity that is used to start, or has the effect of starting, a purge*"—*i.e.*, the "trigger." H.R. Rep. No. 103-9, at 15 (emphasis added). Nothing in the NVRA or its legislative history suggests that Congress intended the Failure-to-Vote Clause in subsection (b)(2)—which applies to the very same "program[s] and activit[ies]"—to have a narrower scope.

Nor would excluding triggering rules from the prohibition against purging for nonvoting be sensible: Given the low voter participation rates in the United States, voter inactivity would be a "trigger" pulled with great regularity. Widespread use of voter inactivity as a trigger by States to initiate notice-confirmation processes would in turn result in broad swaths of Americans being mailed purge notices. And whether a significant proportion of the American electorate remain on the voter rolls would then hinge on whether or not registrants respond to those notices.

In addition, the process the NVRA authorizes for removing voters who have moved out of jurisdiction suggests that the only lawful "trigger" for a notice-confirmation removal process is reliable evidence of voter ineligibility. NVRA Sections 8(c) and 8(d), taken together, detail a safe-harbor method that States can use to identify and subsequently purge voters who may no longer live in an applicable jurisdiction. *See* 52 U.S.C. § 20507(c)-(d). These provisions illustrate Congress's intent that States obtain independent evidence of voter ineligibility—separate and apart from a registrant's failure to vote—prior to initiating a voter purge notice-confirmation process.

Subsection (c) provides that a State seeking to purge its voter registration lists of non-residents may begin by consulting the U.S. Postal Services' National Change of Address ("NCOA") system in order to determine whether a voter has changed his or her address to a location outside of the jurisdiction. *See id.* § 20507(c); H.R. Rep. No. 103-9 at 15. The House Report explains that

> [i]n order to provide some guidance to the States, subsection (c) provides that a

> State may meet the requirements of conducting a general program that makes a reasonable effort to keep voting lists clean by establishing a program which uses the [NCOA] program of the U.S. Postal Service. Use of the NCOA program by a State or any of its registration jurisdictions could be deemed to be in compliance with the requirements that the program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

H.R. Rep. No. 103-9, at 15. Although use of the NCOA is not mandatory, Congress envisioned that States would use it, or some other "reasonable program," to obtain evidence of voter ineligibility prior to beginning a voter removal process. *See* S. Rep. No. 103-6, at 19, 32. For example, States may opt instead to use mailings that are returned as undeliverable as objective evidence of voter ineligibility.

Once evidence that a registrant may have moved has been obtained, the NVRA requires a State to use the notice-confirmation procedures outlined in Section 8(d) to *confirm* that change of address. Section (d)(1) provides that a State may purge an individual from a voter registration list only (1) after a registrant "confirms in writing" that he or she has changed residence to a place outside the registrar's jurisdiction"; or (2) once the registrant fails to respond to an address confirmation notice and fails to vote during the next two Federal election cycles. *See* 52 U.S.C. § 20507(d)(1). Congress's use of the word "confirm" further suggests that Congress intended that States obtain evidence of a change in residence

prior to initiating a notice-confirmation process that might result in the removal of the registrant.

The legislative history of the NVRA substantiates this view. Congress was unambiguous in in its reports that removal should be predicated on a voter's ineligibility. The Senate Report explains, for example, that "[t]he Act allows the removal of a person's name from the official list by reason of a change of residence outside the jurisdiction of the registrar," and that notice could be sent only "[i]f a State determines that a registrant may have changed residence." S. Rep. No. 103-6, at 19, 32-33. More broadly, the NVRA was designed to "assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction." *Id.* at 2. As discussed in Section II.A, *supra*, Congress understood that, given the myriad alternative reasons why an individual might fail to vote, voter inactivity is not a dependable proxy for voter ineligibility. Viewed in that context, the legislative history strongly suggests that a voter removal procedure can be lawfully triggered only by particularized evidence of "a change of residence" (or some other evidence of voter ineligibility)—a failure to vote alone is not sufficient.

III. The Department Of Justice Historically Interpreted The NVRA As Prohibiting Purge Practices Like Ohio's Supplemental Process

Immediately after Congress passed the NVRA, the Department of Justice went to work enforcing its provisions. And in the course of those enforcement efforts, the Department of Justice interpreted the

NVRA as prohibiting all forms of purging for non-voting, even in cases when voters received notice before the purge went into effect. In 1994, for example, Assistant Attorney General of the Department of Justice Civil Rights Division Deval Patrick wrote to the Senior Assistant Attorney General of Georgia objecting to Georgia's procedure of sending a registration confirmation notice to registered voters who failed to vote or otherwise contact election officials for three years. *See* Br. for the United States ("United States Sixth Cir. Br.") Attachment 2 at 1-2, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016), (No. 16-3746), 2016 WL 3923034. Including such people in Georgia's purge procedures "*is directly contrary to the language and purpose of the NVRA*," the Department of Justice wrote, "and is likely to have a disproportionate adverse effect on minority voters in the state." *Id.* at 2 (emphasis added). Allowing such purges to continue would "eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA and, accordingly, 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* (citation omitted).

In the same vein, in 1996 the Department of Justice challenged a Pennsylvania purge law that used a person's failure to vote within five years as a trigger to send the person a notice, which resulted in the person's removal from registration lists if they failed to return the notice or vote in the two subsequent general elections. United States Sixth Cir. Br. Attachment 3, at 14-18. The Department explained that "[t]he NVRA was designed to render superfluous the need for large scale purges and list cleaning systems such as

Pennsylvania's purge for non-voting" through its provision of alternative means of identifying voters who changed residences. *Id.* at 17. According to the Department, Congress decided that "non-voting can not be used as a proxy for ineligibility." *Id.* at 18 n.23. And the Department correctly recognized that Congress even meant to ban *all* purges based on non-voting, no matter how apparently reasonable, such as a law that only purged voters who failed to vote for the previous 100 years. *Id.* As the Department explained, "Congress embodied in the statute its determination that any marginal benefit which might result from permitting the use of non-voting was outweighed by the burden on individuals' rights not to vote and the disparate systemic impact such a rule tends to have on minorities and the poor." *Id.* at 19 n.23.

The list of cases in which the Department of Justice advanced this understanding goes on and on. *See* United States Sixth Cir. Br. at 2-3 (discussing other instances when the Department of Justice challenged provisions similar to Ohio's Supplemental Process); *see also* Federal Election Commission, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* at 5-22 (Mar. 1998) (describing the Department of Justice's objections to Georgia and South Dakota measures that targeted individuals to receive confirmation notices because they had failed to vote in preceding elections).

None of this is to say that the Court owes deference to the Department of Justice's prior interpretations of the NVRA; it does not. *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006). But the executive branch's consistent interpretation of the NVRA for more than

two decades and over three different presidential administrations, from its inception up until this final stage of this case, casts doubt about its sudden about-face.

IV. HAVA Does Not Supersede The NVRA's Prohibition On Non-Voter Purge Practices

In the aftermath of the disputed 2000 presidential election, Congress sought to "improve our country's election system." H.R. Rep. No. 107-329, pt. 1, at 31 (2001). Nothing suggests that in so doing it intended to affect in any way the scope or meaning of the NVRA's prohibition against non-voter purges. To the contrary, Congress expressly provided that HAVA is not to "be construed to authorize or require conduct prohibited under ... or to supersede, restrict, or limit the application of ... [the NVRA]." 52 U.S.C. § 21145(a)(4).

Petitioner points to the provision HAVA added to the Failure-to-Vote Clause stating that "nothing in [the Failure-to-Vote Clause] may be construed to prohibit a State from using the [notice-confirmation procedures outlined in Section 8(d)]" to remove registrants from voter rolls, and argues that this confirms the legality of non-voter purge practices like Ohio's, which engage in a notice-confirmation procedure prior to removing a registrant. *See* Pet'r Br. 36 (quoting 52 U.S.C. § 20507(b)(2)). It confirms no such thing. The far more reasonable interpretation is that this merely clarifies that use of the statutorily mandated procedure for *confirming* independent indicators of ineligibility does not constitute a practice that unlawfully purges for non-voting.

Petitioner further contends that HAVA's requirement that States keep and maintain statewide

registration lists counsels in favor of Ohio's Supplemental Process. Pet'r Br. 38-39. HAVA provides that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). But under this process, "[i]f individuals are to be removed from the computerized list, they shall be removed in accordance with the provisions of NVRA." H.R. Rep. No. 107-730, at 75 (2002) (Conf. Rep.). Again, Congress provided explicitly that it did not intend for HAVA to supersede the voter removal processes mandated by the NVRA. And for the reasons articulated in Section II.B, *supra*, Ohio's Supplemental Process is *not* "in accordance with" the provisions of the NVRA.

From the outset, the Department of Justice shared this post-HAVA understanding of the NVRA. In 2007, for example, the Department agreed to a consent judgment with local officials in New Mexico mandating that the county "shall only place the name of any voter on an inactive list based on objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address or National Change of Address program data showing a move outside the County." United States Sixth Cir. Br. Attachment 7 at 9 ¶ 13. And in 2010—under yet another presidential administration—the Department of Justice issued guidance on the NVRA that, as the Department explained to the Sixth Circuit below, "addresses the precise issue presented in this case and articulates the Department's position that States must have reliable

evidence indicating a voter's change of address before they initiate the NVRA-prescribed process to cancel the voter's registration based on a change of residence." United States Sixth Cir. Br. 2; *see also id.* at 15. The Department revised that guidance when it switched its position in this case, in August 2017. *See* Br. for the United States 14 n.4.

The real-world concerns that motivated the Congresses that enacted the NVRA and HAVA to ban the practice of purging for non-voting remain just as relevant today. *Amicus* Professor Lichtman analyzed voter registration files as part of his work as an expert in a recent North Carolina voting rights case and concluded that upwards of 37,000 North Carolina citizens registered in 2002 but did not vote for the first time until 2012. *See* Response Report of Allan Lichtman, *North Carolina State Conf. of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C. submitted Mar. 24, 2015) (on file with authors); *see also* ECF No. 291-2 at 29, *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658. These voters likely had any number of explanations for their decade-long dormancy, but whatever their reasons, they are precisely the voters Congress sought to protect when it ended the practice of purging for non-voting.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE | AAJC, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATION FUND, LATINOJUSTICE PRLDEF, AND NINETEEN OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Federal Cases

Boustani v. Blackwell,
460 F. Supp. 2d 822 (N.D. Ohio 2006).....26

Common Cause v. Kemp,
Case No. 17-11315 (11th Cir. filed Mar. 23, 2017).....2

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016), *stay denied* 137 S. Ct. 28 (2016).....25

Federal Statutes

52 U.S.C. § 10303(e).....19

52 U.S.C. § 10503(a).....15, 19

52 U.S.C. § 10503(e).....20

52 U.S.C. § 10508.....20

52 U.S.C. § 20507(a)(3), (a)(4).....5, 36, 42

52 U.S.C. § 20507(b)(2).....5, 6, 9, 26

52 U.S.C. § 20507(d)(2).....5

State Statutes

Ohio Rev. Code Ann. § 3501.18(A) 24, 38

Ohio Rev. Code Ann. § 3505.11(A) 38

Ohio Rev. Code Ann. § 3505.20(A) 26

Regulations

Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016) 20

Other Authorities

Adam Liptak, Voting Problems in Ohio Set Off an Alarm, The New York Times (Nov. 7, 2004), https://goo.gl/NaqKyf 24

Agreement, Judgment and Order, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 3, 2010) ECF 4, https://goo.gl/78jxre 23

Alberto R. Gonzales, Prepared Remarks of Attorney General Alberto R. Gonzales at the Anniversary of the Voting Rights Act, The United States Dep't of Justice (Aug. 2, 2005), https://goo.gl/vnr5ML 22

Andy Sullivan & Grant Smith, Use it or lose it: Occasional Ohio voters may be shut out in November, Reuters (June 2, 2016), https://goo.gl/ADPvXz 41

Barron News-Shield, 350,000 voter registrations deactivated (Aug. 23, 2017), https://goo.gl/8FyzfA 35

Brief of Appellants, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 16-3746 (6th Cir. filed July 13, 2016), ECF 24 30

Camille Ryan, "Language Use in the United States: 2011" (Washington: Bureau of the Census, 2012), https://goo.gl/rSbrgQ 16

Catalist, LLC, Race Data Estimate and Ohio Voter File, July 5, 2017 (subscription database accessed Sept. 18, 2017) 32, 33

Center for American Progress, Language Diversity and English Proficiency (May 27, 2014), https://goo.gl/wCY87c 16, 20, 21

Complaint, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 1, 2010) ECF 1, https://goo.gl/RQp5ui 23

Complaint, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 1, https://goo.gl/NhEgvp 23

Doug Livingston, 1 in 7 Ohio registered voters won't receive an invitation to vote absentee, Akron Beacon Journal (Sept. 12, 2016), https://goo.gl/L3QLTX 37

Federal Election Commission, Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996 (Mar. 1998), https://goo.gl/hWvytj 40

Federal Election Commission, Implementing the NVRA of 1993: Requirements, Issues, Approaches, and Examples (Jan. 1, 1994), https://goo.gl/cAMaQu 39, 40

H.R. Rep. No. 94-196 (1975) 20

H.R. Rep. No. 103-9 (1993) 38

Jessie Balmert, *How many were removed from Ohio's voter rolls? It's a mess*, Cincinnati.com (Sept. 22, 2016), https://goo.gl/fvBhUs 29

Letter from Dep't of Justice to Cuyahoga County, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Jan. 10, 2014) ECF 22-1 23

Memorandum of Agreement Between the United States of America and Lorain County, Ohio Regarding Compliance with Section 4(e) of the Voting Rights Act, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 5, https://goo.gl/sGe1SY 23

Nonprofit VOTE, Engaging New Voters: The Impact of Nonprofit Voter Outreach on Client and Community Turnout 7, 10 (Dec. 2015), https://goo.gl/fAAzJF 38

Ohio Sec'y of State, Directive 2015-09, 2015 General Voter Records Maintenance Program at 2 (May 19, 2015), Exhibit to Joint Stipulation, *A. Philip Randolph Inst. v. Husted*, No. 2:16-cv-00303-GCS-EPD (S.D. Ohio Apr. 11, 2016) ECF 16-1 5

Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, https://goo.gl/9CwGZG 31

Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 2:16-cv-303 (S.D. Ohio filed May 24, 2016), ECF 39 ..... 29, 30

Rob Griffin, Who Votes with Automatic Voter Registration? Impact Analysis of Oregon's First-in-the-Nation Program, Center for American Progress (June 7, 2017), https://goo.gl/1z5xAD 36

S. Rep. No. 97-417 (1982) 20

S. Rep. No. 103-6 (1993) 38, 39, 40

Terence M. McMenamin, *A time to work: recent trends in shift work and flexible schedules*, Monthly Labor Review (Dec. 2007), https://goo.gl/g1aPsR 24

U.S. Census Bureau, American Fact Finder, Hispanic or Latino Origin by Specific Origin, 2015 American Community Survey 1-Year Estimates, https://goo.gl/z6A91W 22

U.S. Census Bureau, American Fact Finder, Place of Birth by Nativity, 2015 American Community Survey 1-Year Estimates, https://goo.gl/PZp14F 22

U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for United States: 2009-2013, https://goo.gl/sAq5qa (released Oct. 2015) 16, 17

U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Core-Based Statistical Areas (CBSAs): 2009-2013, https://goo.gl/nJVdUU 17, 18

U.S. Census Bureau, November 2016 Voting and Registration Supplement, Technical Documentation CPS-16 (Mar. 2017), https://goo.gl/zwYDhN 8

U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2012, https://goo.gl/MdsT7h 6, 7, 8

U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2014, https://goo.gl/mzep9F 6, 8

U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2016, https://goo.gl/SbTb6U 6, 7

U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2010, https://goo.gl/3oqiUR 13

U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012, https://goo.gl/9Xrxzg 13

U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014, https://goo.gl/M3p2RN 13

U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016, https://goo.gl/KJnv'l'v 13

U.S. Census Bureau, Table 4b. Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008, https://goo.gl/zyJ1iE 13

U.S. Census Bureau, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2016 (NOTE: Voting rates corrected February 2012), https://goo.gl/bcLjS9 ..... 9, 12, 14

U.S. Census Bureau, Table A-3a. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z 11

U.S. Census Bureau, Table A-3b. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z 11

U.S. Census Bureau, Table A-5a. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z 11

U.S. Census Bureau, Table A-5b. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z 11

U.S. Census Bureau, Voting Rights Determination File, https://goo.gl/YTWafb 18

U.S. Citizenship and Immigration Services, Reading Vocabulary for the Naturalization Test, https://goo.gl/d8cSF1 21

U.S. Citizenship and Immigration Services, Writing Vocabulary for the Naturalization Test, https://goo.gl/2D4aFM 21

U.S. Dep't of Labor, Bureau of Labor Statistics, BLS Reports, Characteristics of minimum wage workers, 2016 (Apr. 2017), https://goo.gl/HyqTRx 24

U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Household Data, Annual Averages, https://goo.gl/Y4vqnw 24

United States Postal Service Office of the Inspector General, Strategies for Reducing Undeliverable as Addressed Mail, Report No. MS-MA-15-006 (May 1, 2015), https://goo.gl/zsr5r8 28

INTEREST OF *AMICI CURIAE*[1]

Amici are twenty-two national and local nonprofit organizations that protect, advance, and support the rights of Asian American and Latino communities in the United States.

Asian Americans Advancing Justice | AAJC (AAJC) is a national nonprofit organization founded in 1991. Based in Washington, D.C., AAJC works to advance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including minority voting and voting rights. Along with its Advancing Justice affiliates, AAJC works to promote justice and bring national and local constituencies together through community outreach, advocacy, and litigation.

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is a Section 501(c)(3) nonprofit, nonpartisan organization whose members include the nation's more than 6,100 elected and appointed Latino officials. NALEO Educational Fund is dedicated to facilitating full Latino participation in the American political process, from citizenship to public service.

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[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. LatinoJustice's continuing mission is to protect the civil rights of and promote justice for the greater pan-Latino community in the United States. During its 45-year history, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law and has litigated numerous precedent-setting legal reform cases challenging multiple forms of discrimination in fair housing, employment, education, language rights, redistricting, and the right to vote.

Descriptions of the additional nineteen *amici* are included in the attached appendix. *Amici* include some of the nation's most prominent Asian American, Latino, and other community nonprofit organizations. Individually, and collectively, *amici* advocate for civil rights and equal treatment for Asian Americans and Latinos through a combination of public policy analysis, civic engagement, professional development initiatives, and legal advocacy. *Amici* are concerned with Ohio's voter purging process as well as those of other states, like Georgia, which has a higher population of Asian American and Latino voters, and which have similar purging practices. *See, e.g.*, *Common Cause v. Kemp*, Case No. 17-11315 (11th Cir. filed Mar. 23, 2017).

SUMMARY OF ARGUMENT

Ohio's Supplemental Process purports to purge from its rolls those voters who have moved, but, in reality, it targets voters for failure to vote in

violation of the National Voter Registration Act (NVRA). And, in doing so, the Supplemental Process disproportionately affects Asian Americans and Latinos.

Asian American and Latino registrants vote at lower rates than the rest of the U.S. population. Because of their lower voting rates, Asian Americans and Latinos are more likely to be subject to Ohio's Supplemental Process and purged from the registration lists than any other racial group.

Asian Americans and Latinos already encounter a number of barriers to voting. For one, a large percentage of the U.S. population is comprised of Asian Americans and Latinos for whom English is not their first language and who may not be fluent in English. As a result, English-only election-related mailings create a barrier to access and comprehension which disenfranchises limited English proficient (LEP) voters, many of whom are Asian American and/or Latino. Notably, Ohio's Confirmation Notice, which explains the steps voters must take to avoid removal pursuant to the Supplemental Process and the consequences of failing to respond, is generally provided in English only. Asian Americans and Latinos also face the brunt of other constraints that the state places on voting. Ohio's Supplemental Process is just one of a slate of policies on registration and voting that have impeded the ability of otherwise eligible Asian Americans and Latinos to register and vote.

In light of the barriers discussed herein, once purged, it is unlikely that many Asian Americans and Latinos will re-register, return to the polls, or,

even if they attempt to vote, be allowed to cast a ballot. This is exactly the disenfranchisement that Congress warned about when enacting the NVRA, especially with respect to low-income voters and those facing language barriers.

Ohio over purges registered voters because its Supplemental Process is not tailored to remove people who have moved. Indeed, the Supplemental Process has resulted in the purging of *thousands* of people based on Ohio's faulty premise that these voters moved. This requires the thousands of purged people to re-register, even though their residence has not changed since they last voted. At best, the Supplemental Process is an overly-broad solution to a relatively minor problem that removes voters, particularly Asian Americans and Latinos, for not voting, a result that Congress explicitly prohibited. Accordingly, the Court should uphold the decision of the Sixth Circuit.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS IS PREDICATED ON A FAULTY PREMISE THAT DISPROPORTIONATELY IMPACTS ASIAN AMERICAN AND LATINO VOTERS

Section 8 of the NVRA permits states to remove voters from its list of registered voters for four reasons: (1) at the request of the registrant, (2) as provided by state law by reason of criminal conviction or mental incapacity, (3) upon death of the registrant, and (4) upon a change in the residence of

the registrant. 52 U.S.C. § 20507(a)(3), (a)(4). Ohio uses two processes to remove voters for a change in residence. *First*, Ohio uses National Change of Address (NCOA) information to send voters who report a change of address to the U.S. Postal Service (USPS) a Confirmation Notice, in accordance with Section 8(d)(2) of the NVRA, 52 U.S.C. § 20507(d)(2). This practice, known as the "NCOA Process," is not at issue. *Second*, Ohio supplements the NCOA Process with its "Supplemental Process," which assumes that a registrant's failure to vote in a two-year period means that such a person has moved.[2] The Supplemental Process uses the registrant's non-voting as a trigger to send a Confirmation Notice to an otherwise properly registered voter, purportedly to "confirm" that the registrant moved. But non-voting is not evidence that a person has moved, exposing the fundamental premise underlying the Supplemental Process as faulty. In turn, the Supplemental Process results in the significant disenfranchisement of voters, particularly Asian Americans and Latinos, for not voting, in violation of the NVRA. 52 U.S.C. § 20507(b)(2).

A. Not Voting Does Not Indicate that a Registered Voter Has Moved and Is Insufficient to Trigger Removal

Ohio's premise for the Supplemental Process is that a person's failure to vote indicates a change in

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[2] Ohio Sec'y of State, Directive 2015-09, 2015 General Voter Records Maintenance Program at 2 (May 19, 2015), Exhibit to Joint Stipulation, *A. Philip Randolph Inst. v. Husted*, No. 2:16-cv-00303-GCS-EPD (S.D. Ohio Apr. 11, 2016) ECF 16-1.

residence. The facts, however, do not support this premise. Non-voting is common and occurs for many different reasons, very few of which have anything to do with having moved; as such, non-voting, without more, is an insufficient basis upon which to assume that a voter has moved.

The U.S. Census Bureau compiles data on the most common reasons people did not vote. In the last three federal elections, the most common reasons for non-voting were *one*, the voter was not interested; *two*, the voter was too busy to vote or had a scheduling conflict; *three*, the voter did not like the candidates or campaign issues; *four*, the voter was sick; *five*, the voter was out of town; or *six*, the voter forgot to vote.[3] Asian American and Latino registered voters expressed the same top reasons for not voting. *Id.* These account for well over 75% of the reasons given by registered voters for not voting. *Id.* None supports Ohio's premise for its Supplemental Process.

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[3] U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2016, https://goo.gl/SbTb6U ("2016 Top Reasons for Non-Voting"); U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2014, https://goo.gl/mzep9F ("2014 Top Reasons for Non-Voting"); U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2012, https://goo.gl/MdsT7h ("2012 Top Reasons for Non-Voting").

Table 1. Reasons Registered Voters Did Not Vote in 2012, 2014, and 2016[4]

Reason	2016	2014	2012
Illness or disability	11.7%	10.8%	14.0%
Out of town	7.9%	9.5%	8.6%
Forgot to vote	3.0%	8.3%	3.9%
Not interested	15.4%	16.4%	15.7%
Too busy, conflicting schedule	14.3%	28.2%	18.9%
Transportation problems	2.6%	2.1%	3.3%
Did not like candidates or campaign issues	24.8%	7.6%	12.7%
Registration problems	4.4%	2.4%	5.5%
Bad weather conditions	0%	0.4%	0.8%
Inconvenient polling place	2.1%	2.3%	2.7%
Other reason	11.1%	9.1%	11.1%
Don't know or refused to answer	2.7%	2.9%	3.0%

Only one reason provided *may* implicate Ohio's stated reason for the Supplemental Process: registration issues. In 2016, 4.4% of registrants reported an inability to vote due to registration issues and the same was reported by 3.3% of Asian Americans and 5.4% of Latinos.[5] In 2014, 2.4% of all registrants and 2.4% of Asian American registrants reported registration issues, as did 2.5% of Latino

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[4] *Id.*

[5] 2016 Top Reasons for Non-Voting, *supra* note 3.

registrants.[6] In 2012, 5.5% of all registrants cited registration issues, as did 5.2% of Asian Americans and 6.1% of Latinos.[7] But there are numerous registration issues implicated in this category that are independent of having moved. The U.S. Census Bureau explained that this category captured those who "didn't receive absentee ballot" as well as those "not registered in current location."[8] Even if this category captured only people who moved but failed to update their registration, this represents an issue involving between 2.4 and 5.5% of all registered voters who did not vote in a given election—a far cry from the 100% of registered voters who did not vote but are targeted for removal by Ohio's Supplemental Process.

B. Voter Registration and Turnout Fluctuates Between Elections and Is Significantly Lower for Midterm Elections than for Presidential Elections

Voter registration and turnout in Ohio, like the nation itself, is significantly lower for midterm elections than for presidential elections. Many registered voters—including many Asian American and Latino voters—do not vote in midterm elections, which is no indication that those registrants have

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[6] 2014 Top Reasons for Non-Voting, *supra* note 3.

[7] 2012 Top Reasons for Non-Voting, *supra* note 3.

[8] U.S. Census Bureau, November 2016 Voting and Registration Supplement, Technical Documentation CPS-16, at 7-2 (Mar. 2017), https://goo.gl/zwYDhN.

moved. Nonetheless, pursuant to Ohio's Supplemental Process, those voters will be sent a Confirmation Notice.

Of the voting-eligible population, registration rates during presidential election years hover slightly over 70%, while rates during midterm election years hover five percentage points lower, at approximately 65%.[9] This nationwide data—which reveals a five percent ebb and flow of registration rates—suggests that registration lists *are* being culled throughout the United States without the need for Ohio's Supplemental Process.

Like registration rates, voting rates amongst the voting-eligible population fluctuate from higher in presidential election years, consistently above 60%, to significantly lower in midterm election years, between 40 and 45%. *Id.* Focusing on the registered voters is telling: In presidential election years, between 85 and 90% of registered voters cast a ballot. However, in midterm election years, only between 65 and 70% of registered voters turned out. This is a 20% drop in voting during midterm elections.

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[9] U.S. Census Bureau, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2016 (NOTE: Voting rates corrected February 2012), https://goo.gl/bcLjS9 ("Voter Registration and Turnout").

Table 2. National Voter Registration and Turnout[10]

	2016	2014	2012	2010	2008
Voted	61.4%	41.9%	61.8%	45.5%	63.6%
Registered	70.3%	64.6%	71.2%	65.1%	71.0%
Percent Voted of Registered	87.3%	64.9%	86.8%	69.9%	89.6%
Percent Registered But Did Not Vote	12.7%	35.1%	13.2%	30.1%	10.4%

This national trend plays out in Ohio, where voter turnout for presidential elections is at least 20% higher than voter turnout for midterm elections.

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[10] *Id.*

Table 3. Ohio Voter Registration and Turnout[11]

	2016	2014	2012	2010	2008
Voted	63.6%	39.7%	63.1%	45.2%	65.5%
Registered	72.1%	66.5%	71.1%	66.1%	73.0%
Percent Voted of Registered	88.2%	59.7%	88.7%	68.4%	89.7%
Percent Registered But Did Not Vote	11.8%	40.3%	11.3%	31.6%	10.3%

[11] U.S. Census Bureau, Table A-3a. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z (voted); U.S. Census Bureau, Table A-5a. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z (voted); U.S. Census Bureau, Table A-3b. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z (registered); U.S. Census Bureau, Table A-5b. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z (registered).

Respondents' brief cites to voter turnout data published by the Ohio Secretary of State. Resp. Br. at 31 & n.15. In this brief, *amici* rely on data from the U.S. Census Bureau. While *amici* acknowledge some differences between the Ohio Secretary of State's data and that from the U.S. Census Bureau, the U.S. Census Bureau data provides more detail, *i.e.*, breakdown by race and allows for a direct comparison of Ohio trends to national trends. While the precise figures may be different in the two datasets, this does not change the arguments made herein.

The 20% fluctuation is not caused by 20% of registered voters moving after each presidential election and failing to cancel their outdated registrations. In fact, as discussed *supra* Section I.A, a change in residence is rarely, if ever, reported as the reason for non-voting. Consequently, when the Supplemental Process is initiated based on failure to vote in a midterm election—for example, after the 2014 election in which more than 40% of Ohio's registered voters did not vote—the Supplemental Process is *guaranteed* to capture *tens of thousands* of people for whom there is absolutely no reason to believe they have moved.

And because voter registration and turnout rates in Asian American and Latino communities are lower than national and Ohio rates, the impact of Ohio's Supplemental Process is magnified for these communities. Nationwide, Asian Americans and Latinos register to vote at rates 13-16% lower than the general population.

Table 4. National Voter Registration by Race[12]

	2016	2014	2012	2010	2008
Total Registered	70.3%	64.6%	71.2%	65.1%	71.0%
Asian American	56.3%	48.8%	56.3%	49.3%	55.3%
Latino	57.3%	51.3%	58.7%	51.6%	59.4%

In Ohio, voter registration data shows that Asian American and Latino communities are registered at lower rates than the general population.

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[12] Voter Registration and Turnout, *supra* note 9.

Table 5. Ohio Voter Registration by Race[13]

	2016	2014	2012	2010	2008
Total Registered	72.1%	66.5%	71.1%	66.1%	73.0%
Asian American	53.1%	60.3%	--[14]	48.8%	52.2%
Latino	68.9%	58.9%	67.0%	49.7%	59.8%

Voter turnout rates, unsurprisingly, follow suit at rates 12-16% lower for Asian Americans and Latinos than for the general public.

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[13] U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016, https://goo.gl/KJnvTv; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014, https://goo.gl/M3p2RN; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012, https://goo.gl/9Xrxzg; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2010, https://goo.gl/3oqiUR; U.S. Census Bureau, Table 4b. Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008, https://goo.gl/zyJ1jE.

[14] The U.S. Census Bureau's sample size was too small to calculate this figure. *Id.*

Table 6. National Voter Turnout by Race[15]

	2016	2014	2012	2010	2008
Total Turnout	61.4%	41.9%	61.8%	45.5%	63.6%
Asian American	49.0%	27.1%	47.3%	30.8%	47.6%
Latino	47.6%	27.0%	48.0%	31.2%	49.9%

Ohio's voter turnout data similarly shows gaps between Asian American and Latino turnout rates compared to the general population. In Ohio, the Asian American turnout rate trended 16-18% lower in presidential election years and closer in midterm election years, while the Latino turnout rate was 6-13% lower in presidential election years and about 16% lower in midterm election years.

Table 7. Ohio Voter Turnout by Race[16]

	2016	2014	2012	2010	2008
Total Turnout	63.6%	39.7%	63.1%	45.2%	65.5%
Asian American	46.8%	38.1%	--[17]	38.5%	46.9%
Latino	57.8%	23.1%	56.9%	29.3%	52.4%

With these lower turnout rates, Asian American and Latino registrants are more likely to be subject to the Supplemental Process. And, as discussed *infra*, barriers to language access make it difficult for

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[15] Voter Registration and Turnout, *supra* note 9.

[16] *Id.*

[17] The U.S. Census Bureau's sample size was too small to calculate this figure. *Id.*

many Asian Americans and Latinos to extricate themselves from the Supplemental Process.

II. OHIO'S SUPPLEMENTAL PROCESS POSES A SIGNIFICANT RISK TO LATINO AND ASIAN AMERICAN POPULATIONS WHO OFTEN ENCOUNTER ADDITIONAL HURDLES IN ACCESSING THE BALLOT

Individuals are less likely to register and vote when they are faced with additional barriers to reading and understanding election-related materials because, in Ohio and many other parts of the United States, they are generally provided in English only and not in the person's native language. *See, e.g.*, 52 U.S.C. § 10503(a). This presents challenges to prospective Asian American and Latino voters that are compounded by the Supplemental Process when these voters are ultimately purged for not voting and not returning an English-only Confirmation Notice.

A. English-Only Election-Related Materials Are Barriers to Registration and Voting

Language access, or the ability to read or comprehend election-related materials in a person's native tongue, is an issue of concern for Latino and Asian American communities. A significant portion of the U.S. population—and its fastest growing segment—is comprised of Latinos and Asian Americans for whom English is not their first language and who may not be fluent in English. Of

approximately 291 million people in the United States over the age of five, 60 million people, or just over 20%, speak a language other than English at home.[18] Among those other languages, the top two categories are Spanish and Asian languages,[19] at 37 million and 11.8 million people, respectively.[20] Within these populations, individuals have varying levels of English proficiency. Those who do not speak English at home and who speak English "less than very well" are considered to have limited English proficiency (LEP), as defined by the U.S. Census Bureau.[21] In the United States, 35% of the Asian alone[22] and Latino populations are LEP.[23]

Ohio's LEP rates for speakers of Asian languages and Spanish are a few percentage points higher than the national average.

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[18] U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for United States: 2009-2013, https://goo.gl/sAq5qa (released Oct. 2015) ("Languages Spoken at Home").

[19] "Asian languages" captures the following U.S. Census Bureau categories: Asian and Pacific Island Languages, Hindi, Gujarati, Urdu, and Other Indic Languages. It excludes Armenian and Persian.

[20] Languages Spoken at Home, *supra* note 18.

[21] Camille Ryan, "Language Use in the United States: 2011," 4 (Washington: Bureau of the Census, 2012), https://goo.gl/rSbrgQ.

[22] "Asian alone" means Asian not in combination with any other racial categories designated in the U.S. Census.

[23] Center for American Progress, Language Diversity and English Proficiency, Fig. 3.2 (May 27, 2014), https://goo.gl/wCY87c.

Table 8. Asian American and Latino LEP Populations in Ohio[24]

	No. of Speakers	Speak English Less Than "Very Well"	LEP
Asian languages	162,682	62,958	38.7%
Spanish	241,651	90,725	37.5%

Moreover, in Ohio's more densely populated areas, LEP rates are often higher than both national (35%) and statewide (38%) rates.[25] LEP rates for Asian language speakers range from 38.1% to 48.7%, and LEP rates for Spanish speakers range from 31.2% to 44.2%.[26]

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[24] Languages Spoken at Home, *supra* note 18.

[25] *Id.*

[26] U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Core-Based Statistical Areas (CBSAs): 2009-2013, https://goo.gl/nJVdUU.

Table 9. Urban Ohio Asian Language LEP Population[27]

City	No. of Speakers	Speak English Less Than "Very Well"	LEP
Akron	12,797	6,230	48.7%
Cincinnati	33,628	12,825	38.1%
Cleveland	33,975	13,083	38.5%
Columbus	48,642	18,672	38.4%
Dayton	13,796	5,418	39.3%

Table 10. Urban Ohio Spanish Speaking LEP Population[28]

City	No. of Speakers	Speak English Less Than "Very Well"	LEP
Akron	8,060	2,514	31.2%
Cincinnati	45,662	18,935	41.5%
Cleveland	64,269	22,120	34.4%
Columbus	50,519	22,337	44.2%
Dayton	13,060	5,114	39.2%

These rates indicate a high population of Asian American and Latino LEP individuals who may have difficulty understanding English-only election materials. According to the most recent U.S. Census Bureau estimates, Ohio has 26,165 Spanish-speaking LEP voter-eligible citizens and 24,841 Asian language speaking LEP voter-eligible citizens.[29]

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[27] *Id.*

[28] *Id.*

[29] U.S. Census Bureau, Voting Rights Determination File, https://goo.gl/YTWafb (select "Public Use Data File and

These voters are reliant on assistance from fluent English-speaking family members or other third parties to navigate the electoral process, including the additional burden of interpretation of an English-only Confirmation Notice sent as part of Ohio's Supplemental Process.

Having recognized the challenges posed by language access issues, Congress enacted several laws to protect the voting rights of language minorities. *First,* Congress recognized language access issues that affected citizens who were educated in Spanish in Puerto Rico. Congress found that, "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process." 52 U.S.C. § 10503(a). Congress enacted Section 4(e) as part of the 1965 Voting Rights Act (VRA), 52 U.S.C. § 10303(e), which requires states to provide LEP Spanish-speaking Puerto Rican voters with voting materials and voting assistance in Spanish. *Second,* ten years later, Congress enacted Section 203 in recognition that certain minority citizens, due to limited English speaking ability, experienced historical discrimination and disenfranchisement. Congress documented a "systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English," and an "extensive evidentiary record demonstrating the

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Technical Documentation"; then open "sect203_All_Areas.csv" and see Col. R (VACLEP) (Voter-Age Citizens LEP)).

prevalence of voting discrimination and high illiteracy rates among language minorities." H.R. Rep. No. 94-196, at 16 (1975). Section 203 requires jurisdictions with a threshold LEP population to provide election-related materials in a native language for "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 52 U.S.C. § 10503(e). *Third*, seven years after enacting Section 203, Congress recognized the need to provide assistance at the polls for "blind, disabled, or illiterate" voters. S. Rep. No. 97-417, at 2 (1982). Congress found that citizens who either do not have written language abilities or who are unable to read or write English proficiently were more susceptible to having their votes unduly influenced or manipulated and were more likely to be discriminated against at the polls. *Id.* at 62. Congress thus enacted Section 208 of the VRA to provide voters with the right to have someone assist them in the voting process. 52 U.S.C. § 10508.

Unless a jurisdiction is subject to Sections 203 or 4(e), it is not federally required to provide voters and prospective voters with election-related materials in any language other than English.[30] Voters in such jurisdictions[31] are reliant upon Section 208 of the

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[30] Center for American Progress, Language Diversity and English Proficiency, at 4 (May 27, 2014), https://goo.gl/wCY87c (defining linguistically isolated a household without at least one 14 year-old who speaks English exclusively or "very well.").

[31] *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016). No jurisdictions in Ohio are covered by Section 203. Cuyahoga and Lorain Counties remain the only counties in Ohio which have been subject to settlement agreements with the Department of

VRA. Section 208, however, is not a failsafe. Some voters are considered linguistically isolated, when they do not have a non-LEP member in the household. Nationwide, 21% of Latino households and 20% of Asian alone households are linguistically isolated.[32] These eligible voters do not have family assistance readily available to explain election-related mailings or assist at the polls.[33] Assuming these linguistically-isolated individuals have overcome language obstacles and registered to vote, if no assistance is available to them at the polls (either because no poll worker speaks their language or because they cannot bring someone with them), they may be unable to navigate the system and end up subject to the Supplemental Process, or worse, purged from the voter rolls because they were unable to vote for the NVRA-mandated two election cycles or communicate with officials that they had not moved. This problem, which discourages voter participation, is correctable, as, when in-language materials are

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Justice under Section 4(e) that require them to provide election-related information and materials in Spanish. *See infra* discussion Section II.B.

[32] *Id.* at Table 3.2.

[33] A person born in the United States has no English language requirement, and, while a person must be able to read and write English to become a U.S. citizen, the requirements for the reading and writing portions of the naturalization test are minimal. *See* U.S. Citizenship and Immigration Services, Reading Vocabulary for the Naturalization Test, https://goo.gl/d8cSF1 (64 words or phrases); U.S. Citizenship and Immigration Services, Writing Vocabulary for the Naturalization Test, https://goo.gl/2D4aFM (75 words or phrases).

provided to prospective voters, voter registration and turnout increases significantly.[34]

B. Ohio Policies Serve as a Barrier to Registration and Voting

Ohio's Supplemental Process is just one of a slate of policies on voter registration and voting that have impeded the ability of otherwise eligible Latino and Asian American voters to register and cast a ballot.

As explained *supra*, Congress enacted Section 4(e) to provide LEP Spanish-speaking Puerto Rican voters materials and assistance in Spanish.[35] Since 2010, the Department of Justice filed two lawsuits against Ohio counties for violating Section 4(e): Cuyahoga County (where Cleveland is located) in

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[34] For example, after the Department of Justice filed a Section 203 lawsuit in San Diego County, California, voter registration among Latinos and Filipinos rose by over 20 percent and Vietnamese registrations increased by 40 percent. *See* Alberto R. Gonzales, Prepared Remarks of Attorney General Alberto R. Gonzales at the Anniversary of the Voting Rights Act, The United States Dep't of Justice (Aug. 2, 2005), https://goo.gl/ynr5ML. And in Harris County, Texas, the turnout among Vietnamese eligible voters doubled following the Department of Justice's efforts at enforcing Section 203. *See id.*

[35] According to the 2015 American Community Survey 1-Year Estimates, Ohio has 411,202 Latinos, with 122,908 of Puerto Rican origin and, of those, 39,198 were born in Puerto Rico. U.S. Census Bureau, American Fact Finder, Hispanic or Latino Origin by Specific Origin , 2015 American Community Survey 1-Year Estimates, https://goo.gl/z6A91W; U.S. Census Bureau, American Fact Finder, Place of Birth by Nativity, 2015 American Community Survey 1-Year Estimates, https://goo.gl/PZp14F.

2010 and Lorain County in 2011.[36] Both cases resulted in settlement agreements, whereby the boards of elections promised to undertake measures that included disseminating bilingual election-related materials and providing bilingual speakers to assist at the polls.[37] A few years after the Cuyahoga County case was settled, the Department of Justice deployed federal observers to monitor precincts in the county and discovered several violations of the settlement agreement, including the translation of materials into a dialect of Spanish that was not fully accessible to Puerto Ricans.[38] The failure to provide Spanish materials for Puerto Rican Americans voting in Ohio elections impedes their ability to vote.

Another issue that reduces voter turnout is voters' inability to go to the polls, which is exacerbated when a state constrains the options it offers voters. Minority voters, particularly Latino

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[36] Complaint, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 1, 2010) ECF 1, https://goo.gl/RQp5ui; Complaint, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 1, https://goo.gl/NhEgvp.

[37] Agreement, Judgment and Order, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 3, 2010) ECF 4, https://goo.gl/78jxre; Memorandum of Agreement Between the United States of America and Lorain County, Ohio Regarding Compliance with Section 4(e) of the Voting Rights Act, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 5, https://goo.gl/sGe1SY.

[38] Letter from Dep't of Justice to Cuyahoga County, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Jan. 10, 2014) ECF 22-1.

workers, often have less flexibility in working hours[39] and face more obstacles to obtaining time off from work to go to the polls. And, even when able to take off from work, a majority of Latino workers are hourly wage earners who may lose pay for those hours.[40] This can be significant to voters in states like Ohio, which has a history of long lines, some requiring voters to wait as long as nine hours before casting a ballot, with an average wait time of two to three hours.[41] In fact, the Supplemental Process tends to contribute to these lines because voters subject to the Supplemental Process are moved to "inactive" status on the voter rolls and are not factored in for precinct allocations. Ohio Rev. Code Ann. § 3501.18(A).

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[39] Data from the last time the U.S. Census Bureau surveyed the population regarding work schedules and flexibility in 2004 revealed that, while 30.9% of white wage and salary workers have flexible schedules, only 20.7% of Latino workers have flexible schedules. *See* Terence M. McMenamin, *A time to work: recent trends in shift work and flexible schedules*, Monthly Labor Review 8 (Dec. 2007), https://goo.gl/g1aPsR.

[40] In 2016, 71.9% of all workers in the United States were paid hourly wages, and, among Latinos, this number was 85.7%—approximately 15% higher. U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Household Data, Annual Averages, Table 37, https://goo.gl/Y4vqnw (111,091,000 workers in the United States, 18,950,000 of which were Latino); U.S. Dep't of Labor, Bureau of Labor Statistics, BLS Reports, Characteristics of minimum wage workers, 2016, Table 1 (Apr. 2017), https://goo.gl/HyqTRx (79,883,000 hourly workers in the United States, 16,241,000 of which were Latino).

[41] Adam Liptak, Voting Problems in Ohio Set Off an Alarm, The New York Times (Nov. 7, 2004), https://goo.gl/NaqKyf.

Nonetheless, states have the ability to adopt measures that make it easier for voters by offering early voting options. While Ohio offers some early voting options, Ohio eliminated Golden Week, during which voters could register and vote on the same day. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623, 650 (6th Cir. 2016), *stay denied* 137 S. Ct. 28 (2016). Given Ohio's Supplemental Process that purges otherwise eligible voters, Golden Week was the most convenient way for a voter to cast a ballot and simultaneously straighten out any registration issues. For example, if voters were to show up during Golden Week and learn that they had been purged from the polls, they would be able to re-register on-the-spot and cast a ballot without incident. But Ohio eliminated Golden Week, leaving voters without the ability to correct any registration issues during early voting.[42]

Ohio has engaged in another tactic that has had long-term reverberations in the Asian American and Latino communities. In 2006, Ohio enacted legislation that allowed poll workers to inquire whether voters were naturalized citizens and, if so, to require such voters to present proof of naturalization; or, if these voters did not have proof of citizenship on them, they were permitted to cast a provisional ballot that was only counted if they submitted proof to the Board of Elections within 10 days. The law was struck down because it

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[42] *Ohio Democratic Party*, 834 F.3d at 646-47 (6th Cir. 2016) (Stranch, J., dissenting) (finding that the elimination of Golden Week disparately impacted African Americans' right to vote in violation of equal protection).

discriminated based on national origin, burdened naturalized citizens' fundamental right to vote, and constituted a poll tax for people who had to request a costly replacement certificate of naturalization. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006). Despite its unconstitutionality, the statute remains on the books and even underwent minor amendments in 2012. Ohio Rev. Code Ann. § 3505.20(A).

In the shadow of this historical context, Ohio implements the Supplemental Process, which targets registrants for removal for non-voting. The resulting problems are compounded by the additional barriers imposed by Ohio that depress voter turnout among Asian Americans and Latinos and purge higher rates of individuals from these communities.

III. OHIO'S SUPPLEMENTAL PROCESS UNLAWFULLY REMOVES REGISTERED VOTERS FOR NOT VOTING

Ohio's Supplemental Process conflates non-voting with moving, and, as such, uses non-voting as a trigger for removal. Ohio claims that the Supplemental Process was instituted to capture the purportedly high numbers of registrants who fail to update their address with USPS. Pet. Br. at 10. In reality, the Supplemental Process is an overly-broad solution to a relatively minor problem that removes large numbers of voters, particularly Asian Americans and Latinos, for not voting, a result that Congress explicitly prohibited, 52 U.S.C. § 20507(b)(2).

A. Data Shows that Ohio's Supplemental Process Is Unwarranted and Unnecessary

At the outset, Petitioner and *amici* in support of Petitioner concede that a majority of people who move *do* submit change of address (COA) forms. *See* Pet. Br. at 56; United States Br. at 33; Former Attorneys Br. at 16; Landmark Legal Foundation Br. at 7; Buckeye Institute Br. at 9 (incorrectly claiming that 40% of people who move fail to submit a COA form).[43] Nevertheless, Petitioner and *amici* suggest that a large portion of people who move fail to notify the Postal Service, thereby justifying the use of the Supplemental Process. Pet. Br. at 56; *see also, e.g.*, Buckeye Institute Br. at 9-10, Georgia Br. at 2. The statistics relied upon, however, do not support the assertion. The only data upon which Petitioner and *amici* rely is a USPS report citing a 2006 study that

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[43] The correct figures are far from the 40% figure that Petitioner and *amici* in support of Petitioner repeatedly invoke as justifying the Supplemental Process. *See* Pet. Br. at 56; Buckeye Institute Br. at 9-10, Georgia Br. at 2. The Buckeye Institute makes several critical errors in applying the 40% figure in running its calculations, Buckeye Institute Br. at 9-10: (1) As explained *infra*, the 40% figure is not solely attributable to a person's failure to notify USPS of a COA. (2) Even if the 40% figure were accurate, it would apply to the population as a whole. The Buckeye Institute based its calculation on households, and failed to make a reduction based on citizens of voting age, those actually registered, and the percentage of those registrants who abstained from the election. The Buckeye Institute's resulting apples-to-oranges comparison of households to the margin of the 2012 presidential election is, thus, grossly misleading.

found that "about 40 percent of [undeliverable as addressed (UAA)] mail is caused by the public, *primarily* because customers do not notify the Postal Service of address changes."[44] The report breaks down the approximately 40% (39.5% to be exact) of UAA mail further, identifying several categories captured by that figure as not attributable to failure to file a COA: no mail receptacle, requires in-care-of box/add info, customer refused, COA incorrectly filed, deceased, and snowbird - temporary move. *Id.* at 13. These inapplicable and irrelevant categories account for 24.2% of the 39.5% UAA mail. Thus, the percent of UAA mail must be reduced so as not to include these irrelevant reasons. Reducing 39.5% UAA mail by 24.2% (39.5%*(100%-24.2%)) results in 29.9% of UAA mail as potentially attributable to failure to notify USPS of a COA.

Next, it is important to note that UAA mail accounts for only 4.3% of *all* mail, *id.* at 1, so this figure, in turn, must be further refined to the percentage attributable to failure to notify USPS of a COA, or 1.3% (29.9% of 4.3%). This number (1.3%) reveals that the Supplemental Process was instituted to capture a tiny fraction of the population.

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[44] United States Postal Service Office of the Inspector General, Strategies for Reducing Undeliverable as Addressed Mail, Report No. MS-MA-15-006 at 1 (May 1, 2015), https://goo.gl/zsr5r8 (emphasis added).

B. Ohio Purge Data Reveals that the Supplemental Process Targets Hundreds of Thousands of Voters Simply Because They Have Not Voted

The Supplemental Process does not target the small number of unreported people who have moved. Instead, the Supplemental Process casts a much wider net and purges many more people—hundreds of thousands of people[45]—the overwhelming majority of whom have not moved. This misalignment and over-purging is apparent in several key ways.

First, as Petitioner concedes, a majority of people who move do submit a COA to USPS. *See* Pet. Br. at 56; *see also* United States Br. at 33; Former Attorneys Br. at 16; Landmark Legal Foundation Br. at 7; Buckeye Institute Br. at 9. Consequently, one would expect there to be more purges pursuant to the NCOA purge than those pursuant to the Supplemental Process. The available data[46] from four of Ohio's 88 counties, however, shows the exact opposite trend:

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[45] Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 2:16-cv-303 (S.D. Ohio filed May 24, 2016), ECF 39, at 20.

[46] Although they have an obligation to maintain accurate records of the purge of registered voters pursuant to the Supplemental Process, many counties in Ohio have not done so. *See, e.g.*, Jessie Balmert, *How many were removed from Ohio's voter rolls? It's a mess*, Cincinnati.com (Sept. 22, 2016), https://goo.gl/fvBhUs. As a result, comprehensive data on the full impact of the Supplemental Process on Ohio voters is unavailable.

Table 11. People Purged by County Pursuant to NCOA or Supplemental Process in 2015[47]

County	NCOA Purge	Supplemental Process Purge
Cuyahoga	10,596	40,627
Green	3,600	21,616
Hamilton	2,118	6,895
Medina	517	767

The overwhelming majority of Ohio's purges are made under the Supplemental Process. In fact, this is the primary way Ohio strikes voters from the rolls, at a rate *three times* that of the NCOA process.[48]

Second, data from the 2016 presidential election shows that thousands of voters, who had been purged under the Supplemental Process for not having voted for many years leading up to the election, came to the polls to vote; these voters had in fact ***not*** moved outside of their polling jurisdiction:

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[47] Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 2:16-cv-303 (S.D. Ohio filed May 24, 2016), ECF 39, at 17.

Amici note that 69,905 voters were purged by the Supplemental Process in four of Ohio's 88 counties; thus, it can be expected that when the other 84 counties are included, the total purged in 2015 by the Supplemental Process numbers in the hundreds of thousands.

[48] Brief of Appellants, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 16-3746 (6th Cir. filed July 13, 2016), ECF 24, at 9.

Table 12. Ohio Purged Voters Who Attempted to Vote in 2016[49]

Year	No. Purged Who Tried to Vote in 2016	Years of Non-Voting	Years Within Polling Jurisdiction
2011	902	At least 11 years	At least 11 years
2013	1,128	At least 9 years	At least 9 years
2015	5,485	At least 7 years	At least 7 years

Each person captured in Table 12 is someone who was unjustifiably purged from Ohio's voter rolls, as they had not moved outside their polling jurisdiction and their voter registration was current. The only logical conclusion is that Ohio is engaging in a systematic process of purging people for not voting.

Consequently, populations who do not vote are the most impacted by Ohio's Supplemental Process. Given the additional hurdles they face in voting, described *supra*, it is not surprising that Ohio's Latino and Asian American communities vote at lower rates than others and are greatly impacted by Ohio's Supplemental Process. In fact, Ohio voter data reveals that the percentages of Asian American and Latino registered voters who did not vote in the two-year period of 2014 and 2015 are the highest of

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[49] Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, https://goo.gl/9CwGZG.

all major groups in Ohio—69.6% and 68.2%, respectively.

Table 13. Ohio Voters by Race in 2014 and 2015[50]

	Active[51] Voter	Dropped[52] Voter	Total Voter
Asian American	8,101	1,523	9,624
Black	264,337	17,867	282,204
Caucasian	3,499,909	282,665	3,782,574
Latino	20,493	2,070	22,563
Unknown	12,215	910	13,125

[50] Catalist, LLC, Race Data Estimate and Ohio Voter File, July 5, 2017 (subscription database accessed Sept. 18, 2017) (search terms: state (Ohio), registered date (null to Dec. 31, 2015), voted in at least one election between Jan. 2014 and Dec. 2015, and did not vote in any election between Jan. 2014 and Dec. 2015) ("Catalist Data").

[51] "Active" means that the individual is on Ohio's voter registration list today and covers both active and "inactive" voters in Ohio. Catalist maintains current data, meaning it provides a snapshot of the current Ohio registration list with historical data about whether a voter participated in past elections.

[52] "Dropped" means that the individual is not on Ohio's voter registration list today. A dropped voter who voted in 2014/2015 had to be active at the time to cast a ballot.

Table 14. Ohio Non-Voters by Race in 2014 and 2015[53]

	Active Non-Voter	Dropped Non-Voter[54]	Total Non-Voter
Asian American	14,633	7,396	22,029
Black	309,952	167,449	477,401
Caucasian	1,829,813	1,551,877	3,381,690
Latino	31,463	16,929	48,392
Unknown	15,097	8,840	23,937

Table 15. Percent of Ohio Voters by Race in 2014 and 2015[55]

	% Voted of Registered	% Did Not Vote
Asian American	30.40%	69.60%
Black	37.15%	62.85%
Caucasian	52.80%	47.20%
Latino	31.80%	68.20%
Unknown	35.41%	64.59%

[53] Catalist Data, *supra* note 50.

[54] From the Catalist data, it cannot be determined whether a dropped non-voter was on the registration list in the 2014/2015 timeframe or whether that voter had already been removed from the registration list prior to 2014/2015. Given that this determination is not possible, dropped non-voters are included in the calculations in this section, resulting in more conservative figures of the impact on Asian Americans and Latinos.

[55] Catalist Data, *supra* note 50.

This means that, after a given election, Asian Americans and Latinos are more likely to be subject to the Supplemental Process and relegated to "inactive" status by Ohio than any other racial group. Consequently, Ohio's pattern of over-purging voters who have not moved and for whom Ohio has no reason to believe have moved has a particularly pernicious and adverse effect on these communities.

IV. THE CONFIRMATION NOTICE AND NEED TO RE-REGISTER DO NOT CURE THE HARMS CAUSED BY OHIO'S SUPPLEMENTAL PROCESS

Sending a Confirmation Notice to a registered voter who has not voted in the past two years, in accordance with the Supplemental Process, does not halt the removal of people who have not moved. The process is only guaranteed to halt if a person returns the Confirmation Notice or votes in the next four years. However, as discussed *supra*, non-voting is commonplace among *all* Americans, particularly during midterm elections and, in particular, among Asian Americans and Latinos who also face additional hurdles accessing the ballot box. Consequently, it is unreasonable to place an additional unnecessary burden on these otherwise properly registered voters to extricate themselves from the Supplemental Process by either returning an English-only Confirmation Notice or by voting. Moreover, after a person who has not moved has been purged, that person must re-register in order to cast a ballot, which is in direct contradiction to Congress's intent in promoting voter registration list

maintenance. Finally, once voters have been purged for not voting, they are not informed of their removal from the lists, so when they *do* attempt to vote, they will not be permitted to cast a ballot. This is precisely the disenfranchisement that Congress sought to avoid.

A. The Confirmation Notice Is Insufficient to Guard Against Removal of Individuals Who Have Not Moved

Petitioner claims that simply sending a Confirmation Notice halts the chain of causation connecting removal to the person's failure to vote. Pet. Br. at 23-29. But, given how few election mailings are returned, there is no factual support for this assertion. While Ohio's Supplemental Process data is incomplete,[56] other states have required registrants to respond to election-related mailings and the data from those efforts is instructive. For example, in June 2017, the Wisconsin Elections Commission mailed approximately 380,000 Notices of Suspension to voters, and only 28,169 people—less than 8%—returned the postcard.[57] And, in Oregon, the Oregon Elections Division sent registration-related mailings to 304,227 people who had recently submitted paperwork with a current address to the Office of Motor Vehicles, and only 57,542—less than

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[56] *See supra* note 46.

[57] Barron News-Shield, 350,000 voter registrations deactivated (Aug. 23, 2017), https://goo.gl/8FyzfA.

20%—returned the card.[58] Where people do not return a Confirmation Notice, as can be expected of approximately 80% of people who receive such notices, Ohio will ultimately purge these eligible voters *for whom there is no evidence that they have moved.* And, where there is ample evidence showing the barriers to voting and low turnout in Asian American and Latino communities, these voters will be disproportionately affected. Ironically, Ohio is trying to circumvent the ban on removing voters for non-voting by requiring people to vote at least once every six years, while, at the same time, making voting more difficult and challenging.

Purging people who have not moved and are otherwise eligible to vote is unacceptable and unlawful. *See* 52 U.S.C. § 20507(a)(3), (a)(4). Individuals who have registered at the address where they reside have every right to believe their registration is current. People should not have to worry about whether Ohio has decided to purge their registration because they were unable to vote in several elections. And, as discussed *infra*, Congress desired this result. Consequently, such people have no reason to expect a requirement of responding to a Confirmation Notice or risk being purged.

In addition to these generally applicable problems with the Supplemental Process, there are additional issues that directly impact Asian American and

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[58] Rob Griffin, Who Votes with Automatic Voter Registration? Impact Analysis of Oregon's First-in-the-Nation Program, Center for American Progress (June 7, 2017), https://goo.gl/1z5xAD.

Latino populations, the communities that are affected by the Supplemental Process at higher percentages than any other. *See supra* Section II. The State of Ohio provides an English-only Confirmation Notice.[59] As explained *supra*, however, Ohio has a greater percentage of LEP Asian American and Latino populations than national rates, of which 20% are linguistically isolated.[60] In such households, there is no one to translate the Confirmation Notice. As a result, Asian American and Latino households have even more reasons than other registrants for not responding to Confirmation Notices that the overwhelming majority of *all* registrants tend not to return.

And when Ohio sends a Confirmation Notice, the person targeted is relegated to "inactive" status. Ohio ignores voters in the "inactive" category and excludes them from consideration in many election administration efforts: Ohio does not send an "inactive" voter certain election-related materials, including the invitation it sends to each of its "active" voters to vote via absentee ballot.[61] Preparations for Election Day similarly exclude "inactive" voters, as they are not accounted for in the allocation of voters

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[59] As noted *supra*, Ohio does not have any Section 203 covered jurisdictions that require it to translate election-related mailings. Cuyahoga and Lorain Counties remain the only Ohio counties that have been subject to Section 4(e) translation requirements. *See supra* discussion Section II.B.

[60] *See supra* note 32.

[61] Doug Livingston, 1 in 7 Ohio registered voters won't receive an invitation to vote absentee, Akron Beacon Journal (Sept. 12, 2016), https://goo.gl/L3QLTX.

to specific precincts or polling locations, Ohio Rev. Code Ann. § 3501.18(A), or for the printing of ballots, *id.* § 3505.11(A). Treating people who have not voted in two years as "inactive" and withholding crucial election-related mailings from them is likely to reduce their probability of voting in subsequent elections.[62]

B. Re-Registration Contradicts Congress's Explicit Goal in Enacting the NVRA

"[A]n underlying purpose of the Act [is] that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." H.R. Rep. No. 103-9 at 18 (1993) (House Report); *see also* S. Rep. No. 103-6 at 19 (1993) (Senate Report). Congress's goal was "to avoid requiring voters to re-register unnecessarily." Br. of the United States at 3 (citing Senate Report at 2). At that time, many states employed a practice of purging registered voters who had not exercised their right to vote. Congress disagreed with that practice, and, through the NVRA, "made clear that State programs to remove ineligible registrants may

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[62] Research shows that contacting potential voters, including those who campaigns typically disregard, results in increased voter turnout amongst those constituencies. *See, e.g.*, Nonprofit VOTE, Engaging New Voters: The Impact of Nonprofit Voter Outreach on Client and Community Turnout 7, 10 (Dec. 2015), https://goo.gl/fAAzJF (contact resulted in 15% higher turnout rates for Latinos and 46% higher turnout for Asian Americans and, amongst voters who campaigns typically disregard, turnout doubled).

not presume that registrants have become ineligible solely because they have failed to vote." *Id.* at 15. Congress forbade removing eligible voters "from the rolls 'merely for exercising their right not to vote.'" *Id.* at 5 (citing Senate Report at 17).

Not only did Congress conclude that non-voting did not merit a presumption of ineligibility to vote, but Congress also understood the risks and costs associated with such improper voter purging. The Senate Report explains: "[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again." Senate Report at 18. Congress also understood that purging for non-voting would disproportionately affect the poor, minorities, and people who are illiterate in English. *Id.* The Senate Report admonished: "These processes [of voter roll maintenance] must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register." *Id.*

The Federal Election Commission (FEC) issued guidance on implementing the NVRA and concluded that targeting non-voters with confirmation notices disproportionately affects minorities, low-income voters, and those with language access issues.[63] The

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[63] Federal Election Commission, Implementing the NVRA of 1993: Requirements, Issues, Approaches, and Examples (Jan. 1, 1994), https://goo.gl/cAMaQu.

FEC observed that "many [people] are not likely to respond [to a confirmation notice] in writing," so a failure to respond cannot support the assumption that a person has moved. *Id.* at 5-21. People who cannot read English or live in linguistically isolated households, for example, will be unable to respond to an English-only Confirmation Notice. As a result, and as the FEC predicted, the process inevitably results in the removal of registered voters who have not moved. *Id.* Moreover, targeting non-voters with confirmation notices has "the ultimate effect of . . . remov[ing] people for failure to vote, including those who may still reside in the same jurisdiction." *Id.* at 5-23. This has a greater impact on minorities, low-income voters, and those with language access issues, who "tend to vote at a lower rate."[64] Consequently, the FEC suggested that failure to vote not be a trigger unless there was (1) a minimum of four years of non-voting (covering at least one presidential election) *and* (2) a secondary basis, other than non-voting, upon which to send a confirmation notice.[65]

Ohio's Supplemental Process contravenes Congress's goals in enacting the NVRA. As indicated by more than 7,500 people who, in 2016, voted for the first time in more than six years, the Supplemental

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[64] Federal Election Commission, Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996, 5-22 (Mar. 1998), https://goo.gl/hWvytj; *see also id.* 5-41.

[65] Federal Election Commission, Implementing the NVRA of 1993: Requirements, Issues, Approaches, and Examples 5-23 (Jan. 1, 1994), https://goo.gl/cAMaQu.

Process has resulted in the purging of *hundreds of thousands* of people on the false assumption that they have moved. These are thousands of people who must now re-register even though their eligibility to vote had not changed since they last voted. As discussed, this practice disproportionately impacts Asian Americans and Latinos.

C. No Remedy for Voters Removed for Failure to Vote

If the Supplemental Process is upheld, individuals will continue to be removed from the rolls in Ohio on the purported basis that they have moved, even though they have not moved. The purged voters do not receive a notification from the Board of Elections that they have been purged from the rolls. In fact, the purged voter's last communication from the Board of Elections will have been the Confirmation Notice, which would have been sent at least four years prior to removal from the rolls.

Not knowing that they have been purged, voters may show up at their precincts to vote, only to be told that they are no longer registered to vote.[66] Ohio does not have same-day voter registration and will not count provisional ballots submitted by purged voters. And, because they did not know that they had been purged, they did not know to re-register 30 days before the election. These voters are

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[66] Andy Sullivan & Grant Smith, Use it or lose it: Occasional Ohio voters may be shut out in November, Reuters (June 2, 2016), https://goo.gl/ADPvXz ("People don't know they've been purged until they go to the election site and get turned away.").

fully disenfranchised under the Supplemental Process despite not falling into any of the permissible categories for removing a registrant from the list. 52 U.S.C. § 20507(a)(3), (a)(4).

Based on the data supplied by Ohio for the 2016 presidential election, over 7,500 people would have been disenfranchised had Ohio not counted the votes of those purged for not voting. Such widespread disenfranchisement is unacceptable and directly contravenes clear congressional intent.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX:

LIST OF ADDITIONAL *AMICI CURIAE*

The **Asian American Legal Defense and Education Fund** (AALDEF) is a 43-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965, the Help America Vote Act, the National Voter Registration Act and the Fourteenth Amendment. AALDEF has litigated cases around the country under the language access provisions of the Voting Rights Act, and seeks to protect the voting rights of language minority, limited English proficient and Asian American voters. AALDEF is concerned that the purge process will disproportionately affect limited English proficient Asian American voters.

Asian Americans Advancing Justice - Asian Law Caucus, founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Americans. Advancing Justice - ALC strives to create informed and educated Asian American communities empowered to assert their rights and to participate actively in American society. As such, Advancing Justice - ALC has for several decades operated a voting rights program that ensures equal access to voter registration, language assistance in voting for limited-English

proficient voters, and fair redistricting that empowers Asian American communities. Based on this commitment to protecting the voting rights of marginalized communities, Advancing Justice - ALC has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Atlanta is the first legal and policy advocacy center dedicated to promoting the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders in Georgia and the Southeast. Advancing Justice | Atlanta's efforts particularly focus on civic engagement and voter mobilization work to increase Asian voter participation in Georgia. This case directly impacts the voting rights of the communities Advancing Justice | Atlanta serves. Therefore, Advancing Justice | Atlanta has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Chicago is a pan-Asian non-profit organization whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. Founded in 1992, Advancing Justice | Chicago leads the largest non-partisan poll monitoring effort in the Midwest that is focused on protecting the voting rights of immigrants. Advancing Justice | Chicago has also advocated for redistricting that fairly recognizes minority communities, improved language assistance for limited English proficient voters, and increased democratic participation through policies such as Automatic Voter Registration. Based on this commitment to protecting the voting rights of marginalized communities, Advancing Justice |

Chicago has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Los Angeles was founded in 1983 and is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. Advancing Justice | LA provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. Advancing Justice | LA's civil rights litigation has covered a broad range of issues such as racial polarized voting, race and national origin discrimination, access to higher education, immigration and naturalization, language rights and garment worker rights. Advancing Justice | LA has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

Arizona Asian & Pacific Island American Vote Table (AZAPIAVT) is a non-partisan, non-profit organization dedicated to safeguarding the voting rights and advancing the voting participation of APIAs. AZAPIAVT empowers APIAs through voter education, voter registration and go out to vote (GOTV), and encourages participation in the democratic process to build a fair, equitable society for all Americans.

The **Coalition for Humane Immigrant Rights** (CHIRLA) is a California leader with national impact made of diverse immigrant families and individuals

who act as agents of social change to achieve a world with freedom of mobility, full human rights, and true participatory democracy. CHIRLA's mission is to achieve a just society fully inclusive of immigrants. CHIRLA organizes and serves individuals, institutions and coalitions to build power, transform public opinion, and change policies to achieve full human, civil and labor rights. For over 30 years, CHIRLA's innovative programming in community education, community organizing, legal services, civic engagement, policy, advocacy, and leadership development for youth, has served the immigrant communities of the Los Angeles region and across the country.

The **Council on American Islamic Relations, Ohio** (CAIR-Ohio) is a nonprofit civil rights organization for Muslims in Ohio. CAIR-Ohio's mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. CAIR-Ohio advances its mission through public outreach, education, advocacy with government, and litigation. CAIR-Ohio encourages the Muslim community to become more politically engaged through regular voter education and voter registration on a nonpartisan basis. CAIR-Ohio has a long history of promoting the voting rights of the Ohio Muslim community. In 2006, CAIR-Ohio successfully sued then Ohio Secretary of State J. Kenneth Blackwell on voting requirements which discriminated against naturalized citizens. CAIR-Ohio seeks to empower naturalized citizens to fully participate in American

democracy and opposes all laws which make voting more difficult.

Fair Elections Legal Network is a national, non-partisan voting rights, legal support, and election reform organization whose mission is to remove barriers to registration and voting for traditionally underrepresented communities. It also works to improve overall election administration by administrative, legal, and legislative reform efforts and strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American, with a particular focus on students, youth, immigrant communities, and minority voters. As such, the organization has provided guidance and technical assistance to organizations seeking to provide voter registration services to eligible voters from these constituencies. Fair Elections Legal Network has an interest in this case because the procedures being challenged disproportionately affect the voting rights of many of the constituencies the organization works with in an effort to maximize the ability to register and to vote. The organization expends resources to provide information, technical assistance, and training to non-partisan civic engagement organizations including language minority organizations in Ohio and around the country. Fair Elections Legal Network fully supports the arguments that Respondents make on the merits as to why the actions of the Ohio Secretary of State involving the state's supplemental process disproportionately affects language-minority Asian-American and Latino voters and should be enjoined.

The **Hispanic Association of Colleges and Universities** (HACU), founded in 1986 and headquartered in San Antonio, Texas, represents more than 470 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. HACU's member institutions enroll two-thirds of the nation's Hispanic college students and six million students altogether. Hispanics, and especially Hispanic students, are vulnerable to the contested procedures to remove citizens from voter rolls because they have had historically lower voter participation rates. This lower participation is particularly true for younger Latinos/as.

The membership of *amicus curiae* the **Hispanic National Bar Association** (HNBA) comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly participates as *amicus* in cases concerning immigration and protection of refugees.

The **Immigrant Legal Resource Center** (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of

immigrant families and communities. The ILRC has a direct interest in this case, because ILRC supports civic participation by immigrant communities, including through civic engagement programs that train immigrants and their families to advocate on their own behalf and become more engaged in their community. The ILRC leads the New Americans Campaign, which helps lawful permanent residents apply for naturalization. Once naturalized, these new Americans may exercise their right to vote. New Americans Campaign partners have helped nearly 300,000 lawful permanent residents apply for U.S. citizenship nationally, including in Ohio.

The **Jewish Council for Public Affairs** is the national voice for more than 125 local Jewish Community Relations Councils and Community Engagement Committees, and 16 national Jewish agencies. Its mandate is to advance the interests of the Jewish people and to promote a just American society.

The **National Asian Pacific American Bar Association** (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over eighty state and local Asian Pacific-American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, the National Asian Pacific American Bar Association has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity,

and opportunity for Asian Pacific Americans. NAPABA has consistently supported protections for and the inclusion of limited English proficient individuals throughout the legal and voting system.

The **National Association of Jewish Legislators** (NAJL) is an organization for Jewish state and local elected officials in the United States. NAJL is committed to equal justice and the right of all Americans to be able to register to vote and to participate in electoral politics without encumbrance.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Latina/o Psychological Association** (NLPA) is a nonprofit and nonpartisan organization of mental health professionals, academics, researchers, and students whose objective is to create a supportive professional community that advances psychological education, training, science, practice, and organizational change to enhance the health, mental health, and well-being of Latina/o communities. This includes challenging any and all efforts that stand in the way of having one's voice

heard and counted in the democratic process. As such, the NLPA is committed to efforts that can transform the election system into one that is affirmative of the rights of all, particularly our most vulnerable, marginalized, and Spanish speaking populations.

OneAmerica is a nonprofit, non-artisan organization whose mission is to advance democracy and justice through building power in immigrant and refugee communities with key allies in the State of Washington. Founded in 2001, in service to this mission OneAmerica engages in nonpartisan, in-language voter registration, get out the vote, voter protection and policy advocacy to ensure effective representation of low-income, immigrant and refugee communities of color, including Latino, African, Asian American and Pacific Islander communities. These communities are historically under-represented populations and are registered to vote at much lower rates than the overall population. As a consequence, our community members bear disproportionate impacts in policy making, including OneAmerica's policy priorities related to voting rights, immigration and refugee policy, education and environmental policy. We are deeply concerned over policies that would hamper the democratic participation of these communities.

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including the right to vote and the rights of Asian American and Latino communities in the United States. Founded in 1981

by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values and to help overcome barriers to voting and political participation. In particular, PFAWF has conducted and continues to conduct significant voter education and mobilization activities aimed at traditionally disenfranchised persons, including Latinos and Asian Americans, and those efforts would be materially harmed by state efforts to purge voters for not voting in past elections. PFAWF accordingly joins this brief.

RECORD
AND
BRIEFS

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No. 16-980

In the

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION OF THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OF SENATOR SHERROD BROWN IN SUPPORT OF RESPONDENTS AND FOR AFFIRMANCE

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QUESTION PRESENTED

Does Ohio's "Supplemental Process"—a list-maintenance program that relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote"?

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INTEREST OF *AMICUS CURIAE*[1]

I am the senior United States Senator from the State of Ohio. Before my election to the Senate, I served as a member of the United States House of Representatives representing Ohio's 13th congressional district from 1993 to 2007. Before that I served as the Ohio Secretary of State from 1983–1991 and as a member of the Ohio House of Representatives.

I have long fought to ensure Ohioans' voting rights and to make voting easier and more accessible for all eligible voters. During my two terms as Ohio's Secretary of State, I oversaw eight elections. My focus was voter-registration outreach. We set up voter-registration sites in high schools and employment centers, food banks, and DMVs. I asked utility companies to include voter-registration forms in their monthly bills. I even asked McDonalds to print voter-registration forms on the back of their tray liners. As a result, some voters submitted registration cards with ketchup and mustard on them—and we accepted them.

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[1] Counsel for the parties have filed notices of blanket consent to the filing of *amicus curiae* briefs in support of either or of neither party. No counsel for a party authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared *pro bono publico*.

As Secretary of State, I also worked on S. 250, the National Voter Registration Act of 1991, which passed in both the Senate and the House but was vetoed by President Bush.

In 1993, as a freshman congressman, I was asked to help manage the floor debate on the National Voter Registration Act of 1993 (NVRA).[2] The bill passed in the House by a healthy margin and also passed in the Senate, becoming one of the first major bills signed by President Clinton. The NVRA is, of course, one of the two key federal statutes at issue in this case.

In the Presidential election of 2004, I observed a dysfunctional election marred by electronic voting machines improperly tallying votes and Ohioans' having to wait in line for hours in some cases. I observed the events of that day at Oberlin College, in my congressional district, where voters, many of them young, waited for six hours to vote. At Kenyon College, just over an hour south and not far from where I grew up, voters waited nine hours to vote.

As a Senator, I have continued to pay close attention to developments that affect the fundamental right to vote.

In March of 2009, I was one of 11 Senators to introduce S.258, the Caging Prohibition Act of 2009, which would have prohibited interference with regis-

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[2] 52 U.S.C. §§ 20501–20511 (formerly 42 U.S.C. §§ 1973gg–1973gg-10).

tration or voting based solely on unreliable information, such as a "caging list." Caging is a voter-suppression tactic in which a political party, campaign, or other entity sends mail marked "do not forward" to a targeted group of voters—often minorities or residents of minority neighborhoods. A list of those whose mail was returned "undelivered" is then used as the basis for challenges to the right of those citizens to vote, on the ground that the voter does not live at the address where he or she is registered. But there are many reasons that mail is returned undelivered. An eligible voter could be overseas on active military service or a student registered at a parent's address. The Caging Prohibition Act would have mandated that anyone who challenges another citizen's right to vote must set forth the specific grounds for that voter's alleged ineligibility and describe the evidence to support that conclusion, under penalty of perjury.

In June 2011, I raised concerns over highly restrictive photo identification voting laws that were under consideration or already signed into law in several states across the country. In a letter to the U.S. Department of Justice, I asked the agency to use its full powers under the Voting Rights Act to review these laws and their implementation.

In May 2012, along with then-Senate Majority Whip Dick Durbin (D-IL), I held an official hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights at the Carl B. Stokes United States Federal Courthouse in Cleveland. The hearing examined the impact of

Ohio's H.B. 194, a bad law that was only partially repealed while awaiting a referendum. The law would have reduced the number of early voting days from 35 to 17, eliminated voting on the weekend before an election, removed the requirement that poll workers direct voters to their proper precinct, and prohibited county boards of elections from mailing unsolicited absentee ballots.

In October of 2014, I cosponsored S.1945, entitled "The Voting Rights Amendment Act of 2014." This bill, and its bipartisan House counterpart, H.R.3899, sought to update the coverage formula used to determine which states are in violation of Section 5 of the Voting Rights Act of 1965 and to add more transparency to elections by requiring all states and counties to provide public notice of any changes shortly before an election that may affect voter turnout or alter polling places.

In December of 2015, Senator Durbin and I called on the Obama Administration to comply with the NVRA by giving Americans applying for health insurance through the Affordable Care Act's Federally Facilitated Marketplace (FFM) a meaningful opportunity to register to vote. Among other things, the NVRA ensured that all individuals who apply for public assistance are granted a meaningful opportunity to register to vote. Most states that were operating their own exchanges under the ACA already had taken steps to comply with the NVRA. But the FFM only included a link to a voter-registration form in its online application and was not in full compliance with the law. In a letter to

U.S. Secretary of Health and Human Services Sylvia Mathews Burwell and Attorney General Loretta Lynch, we argued that each time a person applies for health insurance through the FFM—whether by phone, by mail, or online—he or she should be provided with an opportunity to register to vote in compliance with the requirements of the NVRA.

SUMMARY OF ARGUMENT

There is no greater symbol of our democracy than our citizens' right to vote. The NVRA protects this fundamental right through two provisions that Ohio's Supplemental Process violates. First, the NVRA ensures that, once a citizen has properly registered to vote, a state cannot remove that person's name from the voting rolls unless he or she has become ineligible. More specifically, before deleting someone's name from the rolls by reason of a change of residence, a state must have reliable evidence that the voter has moved, and then confirm that he or she has moved through a process that the NVRA sets forth. Ohio's Supplemental Process subjects voters to this confirmation process without any reliable evidence that they have moved, and, if permitted, would wrongly cancel the registrations of thousands of eligible Ohio voters.

Second, the NVRA prohibits states from carrying out any program or activity that has the effect or outcome of removing voters from the rolls by reason of their failure to vote. Citizens have the right not to vote for any reason, and states cannot penalize them for doing so by canceling their registrations. Ohio's

Supplemental Program does exactly that because it uses registered voters' failure to vote as the trigger to subject them to the change-of-residence confirmation process.

The Help America Vote Act of 2002 (HAVA)[3] confirms that Ohio's Supplemental Process violates the NVRA. It reiterates that states must ensure that voters remain on the voting rolls unless they become ineligible, and that states cannot use the NVRA's change-of-residence confirmation process in a way that results in striking voters' names from the rolls for failure to vote.

ARGUMENT

I. Ohio's "Supplemental Process" violates the NVRA.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Finding this precious right jeopardized for many Americans, in 1993 Congress enacted the NVRA to enhance and protect access to the ballot box. It does so in two ways that are especially important here.

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[3] 52 U.S.C. §§ 20901–21145 (formerly 42 U.S.C. §§ 15301–15545).

First, the NVRA provides that, once someone has properly registered to vote, a state may not remove that person's name from the voter rolls unless he or she has become ineligible. "[O]ne of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19 (1993). The statute therefore prohibits states from striking a voter's name from the rolls for any reason other than the five that it enumerates: request by the voter; criminal conviction; mental incapacity; death; or change of residence. 52 U.S.C. § 20507(a)(3)-(4). And the statute also regulates how states may go about removing voters' names for those enumerated reasons. *Id.* at § 20507(b)-(d).

In the case of removal for change of residence, the state first must have reliable evidence indicating that a voter has changed residences and then must confirm that he or she has moved using a process that includes, at a minimum, certain steps that the statute sets forth. *Id.* at § 20507(a)(4), (c), and (d). The confirmation process is exactly that—a means to *confirm* a move that the state already has reason to believe occurred. It was never intended to be, and could not reasonably function as, a standalone procedure to identify voters who have changed residences. By treating it as one, and by deleting registered voters' names from the rolls without any reliable evidence that they have moved, Ohio's Supplemental Process violates the NVRA.

Second, the NVRA prohibits states from penalizing citizens for not voting. Congress recognized that, "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6 at 17 (1993). The NVRA therefore broadly prohibits states from carrying out any program or activity that "*result[s] in* the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote[.]" 52 U.S.C. § 20507(b)(2) (emphasis added).[4]

Ohio's Supplemental Process violates this prohibition because it uses a registered voter's failure to vote as the trigger to subject that voter to the change-of-residence confirmation process. If the voter then fails to respond to a notice—which he or she may never receive, may mistake for junk mail, or may simply misplace—and then fails to vote in future elections, Ohio will strike that person's name from the voter rolls. The Supplemental Process therefore "result[s] in" the removal of thousands of eligible Ohio voters from the rolls by reason of their failure to vote.

As I explain further below, Ohio's Supplemental Process violates the NVRA for both these reasons. The Supplemental Process does exactly what these provisions are supposed to prevent: it improperly cancels Ohioans' voter registrations even though

[4] As I discuss below, HAVA added language to this provision and further confirms that Ohio's Supplemental Process is illegal.

they remain eligible to vote; and it penalizes Ohio voters for exercising their right not to vote in particular elections.

A. States must have reliable evidence that a voter has changed residences before subjecting that voter to the NVRA's procedure for confirming a change of residence.

The NVRA requires states to "provide that the name of a registrant may not be removed from the official list of eligible voters except" on the five bases that the statute sets forth. 52 U.S.C. § 20507(a)(3)-(4). The NVRA also regulates how states may go about removing voters' names on these bases, including how states may identify voters who have changed residences—a rationale that has been used to support abusive voter purges in the past. *Id.* at § 20507(b)-(d).

States may remove voters for change of residence only as part of a program that "makes a reasonable effort" to identify such voters. 52 U.S.C. § 20507(a)(3)(C) and (4). To clarify what such an effort entails, Congress provided an example in the NVRA. 52 U.S.C. § 20507(c). Under the statutory procedure, states may use change-of-address information from the U.S. Postal Service "to identify registrants whose addresses may have changed[.]" *Id.* at § 20507(c)(1)(A). If that information shows that the voter has moved outside the jurisdiction, states must then "use[] the notice procedure described in subsec-

tion (d)(2) *to confirm* the change of address." *Id.* at § 20507(c)(1)(B)(ii) (emphasis added).

In other words, a reasonable effort to identify voters who have changed residences requires, first, receiving reliable evidence that the voter has moved outside the jurisdiction, and then using the statutory notice procedure to *confirm* that the move occurred. This is how the Department of Justice, the agency charged with enforcing the NVRA, interpreted the statute for many years before the DOJ reversed course in this case and changed its interpretation. *See* Br. of the United States as Amicus Curiae before the Sixth Circuit at 8 ("[B]efore a State can start the confirmation process that leads to removal of voters from its voter registration rolls based on a change of residence, it must have reliable evidence that the voter has moved. Declining to vote does not provide such evidence.") The DOJ's original interpretation is correct and conforms to both the NVRA's language and Congress's intent. *See* S. Rep. No. 103-6 at 39 (1993) ("The bill would permit a state, *if it determines a voter has moved*, to remove the voter from the list only after sending a forwardable notice . . . .") (emphasis added).

The confirmation process, by itself, is not a reasonable effort to identify voters who have moved, nor was it ever intended to be. The NVRA provides that "[a] State shall not remove" a voter's name from the rolls by reason of a change of residence "unless" the voter has failed to respond to the required notice and then failed to vote, or to appear to vote, in two Federal elections. 52 U.S.C. § 20507(d)(1)(B). The NVRA

thus mandates the confirmation process as a necessary but not sufficient element of a program to identify voters who have changed residences. If the confirmation process alone were sufficient, then the exemplary program that Congress wrote into the NVRA—which requires states to receive information from the U.S. Postal Service that a voter has moved and then to confirm the move through the statutory notice procedure—would be meaningless verbiage, serving no purpose. *See* 52 U.S.C. § 20507(c). That is not what Congress intended. The language and structure of the NVRA foreclose such an interpretation. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting.") (internal quotation marks and citations omitted).

The elements of the confirmation process—failure to respond to a notice and failure to vote—cannot by themselves reliably indicate whether a voter has changed residences. Voters may fail to respond to a notice for many reasons that have nothing to do with moving outside the jurisdiction. Some will never receive it (or their response will never reach its destination) due to mailing irregularities. Others—such as active duty service members—will be called away from their homes for extended periods, preventing them from responding. Others will mistake the notice for junk mail, which often mimics official communications. Others will intend to respond but inadvertently misplace the mailing or discard it. Failure to respond to a notice may therefore help *confirm* a change of residence that the state already has reason to believe occurred, as the NVRA pro-

vides; but it cannot by itself reliably indicate that a voter has moved.

Likewise, failure to vote cannot by itself reliably indicate a change of residence. As I explain below, the NVRA protects citizens' right not to vote, which they may do for many reasons. Congress also recognized that failure to vote is empirically a poor indicator that a voter has become ineligible. S. Rep. No. 103-6, at 17 (1993) (noting that purging non-voters is "highly inefficient and costly" and results in removing many eligible voters' names from the rolls "merely for exercising their right not to vote.") Indeed, that inadequacy was vividly displayed here, where, without the Sixth Circuit's order, the votes of over 7,500 eligible Ohioans would have gone uncounted in the 2016 election because Ohio's Supplemental Process wrongly identified them as having moved out of the jurisdiction. Pet. Br. at 14.

In short, the NVRA prohibits states from striking voters from the rolls by reason of change of residence unless the state first receives reliable evidence that the voter has moved and then confirms that he or she has moved using the statutory process. Ohio's Supplemental Process subjects voters to the confirmation process without any reliable evidence that they have moved, and, if permitted, would delete thousands of eligible citizens' names from the voting rolls. The Supplemental Process thus violates the NVRA.

B. Ohio's Supplemental Process "result[s] in" the removal of numerous eligible voters by reason of their failure to vote.

When Congress enacted the NVRA, it recognized that, "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6 at 17 (1993). The NVRA therefore prohibits states from carrying out any program or activity that "*result[s] in*" cancellation of any person's voter registration by reason of his or her failure to vote. 52 U.S.C. § 20507(b)(2) (emphasis added).

By prohibiting programs or activities that "result in" removal by reason of failure to vote, the NVRA bars voter-purge programs that use change of residence as their stated rationale for removal if those programs have the effect or outcome of removing voters by reason of their failure to vote. Section 8(b)(2) of the NVRA[5] imposes an independent requirement that programs must meet, even if they comply with section 8(a)(3).[6]

That protection is necessary because, as Congress recognized, non-voters "may not have moved or died or committed a felony. Their only 'crime' was not to have voted in a recent election." S. Rep. No. 103-6 at 17 (1993). People do not cast a ballot for many reasons, including dissatisfaction with the current slate of candidates and circumstances be-

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[5] 52 U.S.C. § 20507(b)(2).

[6] 52 U.S.C. § 20507(a)(3).

yond their control such as lack of transportation, multi-hour delays at polling places, illness or disability, and many others. Additionally, many of our service members fail to cast ballots due to the unique challenges of overseas voting for deployed military personnel. Congress therefore recognized that using failure to vote "as an inexpensive method for eliminating persons believed to have moved or died" inevitably results in deleting eligible voters from the rolls. *Id.* Some members also observed that this practice disproportionately harms lower income people and racial minorities. *Id.* at 18.

Ohio's Supplemental Process "result[s] in" purging these voters by reason of their failure to vote because it uses failure to vote as the trigger to subject them to the statutory confirmation process. 52 U.S.C. § 20507(b)(2). Under the Supplemental Process, voters who sit out a single election are compelled to take an affirmative step—responding to a notice or voting in an upcoming election—to remain registered. Whereas the NVRA imposes the burden on states to ensure that voters remain on the rolls unless they become ineligible, the Supplemental Process imposes the burden on citizens to remain on the rolls if they fail to vote even once. And whereas the NVRA protects voters' right not to vote, the Supplemental Process penalizes them for not voting and results in the cancellation of thousands of eligible voters' registrations by reason of their failure to vote. For this reason as well, the Supplemental Program violates the NVRA.

II. HAVA reaffirms that Ohio's Supplemental Process is illegal.

Congress enacted HAVA in the aftermath of widespread voting problems in the 2000 election. HAVA makes clear that it only reinforces—and in no way diminishes—the protections afforded to voters under the NVRA. It states that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a)(4).

HAVA reaffirms both provisions of the NVRA discussed above. First, it requires states to maintain their official computerized lists of registered voters "in a manner that ensures that . . . only voters who are not registered or who are not eligible to vote are removed from the computerized list[.]" 52 U.S.C. § 21083(a)(2)(B)(ii). States also must put in place "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." *Id.* at § 21083(a)(4)(B). HAVA therefore reaffirms that states must have reliable evidence that a voter has changed residences before striking his or her name from the voter rolls for that reason. Ohio's Supplemental Process fails this test because it deletes voters' names from the rolls without any reliable evidence that they have moved. If permitted, the Supplemental Process would wrongly cancel the registrations of thousands of eligible Ohio voters.

Second, consistent with the NVRA, HAVA states that "registrants who have not responded to a notice

and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*" 52 U.S.C. § 21083(a)(4)(A) (emphasis added). In other words, even when states use the statutory notice procedure, they must ensure that no voter's name is removed from the rolls solely by reason of his or her failure to vote. But that is precisely what Ohio's Supplemental Procedure does, because it uses failure to vote as the trigger to subject voters to the confirmation process. HAVA therefore reaffirms that Ohio's Supplemental Process violates the NVRA for both reasons discussed above.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE,
NORTHEAST OHIO COALITION FOR THE HOMELESS,
AND LARRY HARMON,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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138 Cong. Rec. 17,965 (1992) 16

The Federalist No. 60
(Alexander Hamilton)
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Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (rev. ed. 2009) 15

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STATEMENT OF INTEREST

The Buckeye Institute was founded in 1989 as an independent research and educational institution to formulate and promote solutions for Ohio's most pressing public-policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, including electoral reform; compiling and synthesizing data; formulating policies; and marketing those public-policy solutions for implementation in Ohio and replication across the country.[1]

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[1] All parties have granted blanket consent to the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The canon of constitutional avoidance requires the NVRA to be interpreted to allow Ohio to remove inactive and non-responsive voters from its registration rolls. As this Court recently explained, the Constitution respects the sovereign power of the states to set and enforce their own voter qualifications, and thus "it would raise serious constitutional doubts if a federal statute precluded a State from [doing what is] necessary to enforce its voter qualifications." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258–59 (2013). That is exactly what would happen if the NVRA were interpreted in accord with the decision below.

As all parties recognize, it is a core voter qualification in Ohio for a person to be a resident of the state, county, and precinct where he or she intends to vote. In order to enforce that qualification, the state needs a reliable method to identify and remove registrants who have changed their residency status. A key part of that enforcement effort is the state's practice of sending confirmation notices to inactive voters—who have traditionally been regarded as posing a high risk of changed residency—and then removing them from the voter rolls if they both fail to respond to the notice and continue to remain inactive. If the NVRA were interpreted to prohibit this practice, it would violate the Constitution by severely impeding the state's power to enforce its voter qualifications.

This intrusion on the state's sovereign power over voter qualifications cannot be justified as an exercise of Congress's power under the Elections Clause to

regulate the "Times, Places and Manner of holding Elections." Article I, § 4, cl. 1. At most, this clause authorizes Congress to make procedural regulations governing the time, place, and manner of voting or registering to vote. It does not authorize Congress to dictate the states' substantive rules for determining *who* should be removed from the registration rolls in order to enforce the state's voter qualifications.

ARGUMENT

I. Congress May Not Force Ohio To Keep Inactive and Nonresponsive Voters On The Rolls

As Ohio has explained in its brief, the most straightforward reading of the NVRA does not prohibit the state from applying its longstanding "Supplemental Process" to maintain the integrity of its voter rolls. By its terms, the NVRA prohibits states from deregistering voters "by reason of [their] failure to vote." 52 U.S.C. § 20507(b)(2). Ohio's process respects that rule by sending confirmation notices to inactive voters and then removing them from the rolls *only if they fail to respond to the notice*. Accordingly, any deregistration that occurs is plainly "by reason of" the voter's failure to respond to the notice, not his or her "failure to vote." *Id.*

Even if the statute could be read to support a contrary conclusion, the canon of constitutional avoidance would forbid it. As this Court has explained many times, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of

Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932). Here, that canon squarely applies because construing the NVRA to prohibit Ohio from removing inactive and nonresponsive voters from its rolls would intrude on the state's sovereign authority to set and enforce its own voter qualifications.

A. The Constitution Gives States The Sovereign Authority To Set And Enforce Voter Qualifications

As this Court recently explained, the "constitutional power to determine voting qualifications"—i.e., the criteria for who is eligible to vote—lies exclusively with the states. *Inter Tribal Counci.*, 133 S. Ct. at 2259. The Constitution expressly ties voter qualifications for federal elections to the qualifications set by states in their own state legislative elections. Thus, under Article I, § 2, the electors in each state for members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment establishes the same rule for the election of senators. And for presidential elections, "[e]ach State shall appoint [electors], in such Manner as the Legislature thereof may direct." Article II, § 1, cl. 2.

Accordingly, states have the sovereign authority to determine voter qualifications for federal elections, so long as they mimic the qualifications for state legislative elections and, of course, do not violate the Constitution's specific prohibitions on voter qualifications: No person can be denied the vote

based on race, color, or previous condition of servitude (the Fifteenth Amendment); sex (the Nineteenth); a poll tax (the Twenty-Fourth); or an age limit above 18 (the Twenty-Sixth). But otherwise, the power over voter qualifications rests exclusively with the states.

By contrast, the federal legislature has no power over voter qualifications, but only the limited power to "make or alter" regulations governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Article I, § 4, cl. 1. This Elections Clause provision "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257. Accordingly, "[p]rescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.'" *Id.* at 2258 (quoting *The Federalist* No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Moreover, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements, . . . it would raise serious constitutional doubts if a federal statute precluded a State from [doing what is] necessary to enforce its voter qualifications." *Inter Tribal Council*, 133 S. Ct. at 2258–59. This principle follows from the venerable canon that the "[a]uthorization of an act also authorizes a necessary predicate act." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012). As Chief Justice Marshall observed in *McCulloch v. Maryland*, "[t]he government which has a right to do an act, and has

imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." 17 U.S. (4 Wheat.) 316, 409–10 (1819). *See also Luis v. United States*, 136 S. Ct. 1083, 1097–98 (2016) (Thomas, J., concurring in the judgment) (further explaining the "Predicate-Act Canon"). Accordingly, the Constitution's clear authorization of state governments to set voter qualifications necessarily entails the power to enforce them.

The importance of the states' enforcement power is well illustrated by this Court's recent decision in *Inter Tribal Council*. In that case, Arizona made U.S. citizenship one of its voter qualifications. Accordingly, in order to "avoid serious constitutional doubt," this Court held that the NVRA had to be interpreted to provide Arizona with an effective "means of enforcing" its citizenship qualification. 133 S. Ct. at 2259. In particular, the NVRA had to be read to allow the state to obtain evidence of applicants' citizenship through the federal registration form mandated by the NVRA. Under the avoidance canon, this interpretation was required as long as it was "at least a possible" reading of the NVRA, even if it was "plainly not the best reading." *Id.* Moreover, if the federal agency responsible for administering the NVRA subsequently refused to allow the state to use the federal form to obtain "information the State deems necessary to determine" citizenship, then the state could "assert a constitutional right to demand concrete evidence of citizenship" "apart from" the federal scheme. *Id.* at 2259-60 & n.10.

B. Blocking Ohio's Supplemental Process Would Intrude On Its Authority Over Voter Qualifications

Because Ohio has exclusive authority to set and enforce its voter qualifications, federal law may not prohibit the state from enforcing its residency qualification through the "Supplemental Process" established by state law. Under that longstanding and bipartisan process, the state sends confirmation notices to voters who have been inactive for over two years, and then removes them from the rolls if they both fail to respond to the notice and fail to engage in voter activity for four more years. Interpreting the NVRA to prohibit Ohio from following this longstanding process would unconstitutionally impede the state's ability to enforce its residency requirement, which is one of its core voter qualifications.

1. Like most states, Ohio requires that an elector be both "a resident of the state thirty days immediately preceding the election" and "a resident of the county and precinct in which the citizen offers to vote." Ohio Rev. Code Ann. § 3503.01(A); *see also* Ohio Const. art. V, § 1 (elector must be "a resident of the state, county, township, or ward, such time as may be provided by law"). It has long been recognized that this type of "[r]esidence requirement[]" is one of the most "obvious examples" of a voter "qualification[]." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959).

In order for Ohio to meaningfully enforce its residency qualification, it must periodically reassess the residency of its registered voters. Particularly

because any registered voter can vote by mail in Ohio, there is often no way to verify a voter's residency in person. Accordingly, it is essential for the state to have a reliable means of verifying residency remotely.

The state's practice of sending confirmation notices to inactive voters is a crucial mechanism for confirming their residency. It would be practically infeasible and quite counter-productive for the state to send confirmation notices to *every* registered voter in the state, which would needlessly impose an enormous logistical burden. This would not only require the annual processing of millions of extra notices by the state, but would also require millions of voters to fill out unnecessary paperwork, resulting in a significantly higher number of "false positive" de-registrations compared to the status quo.

By contrast, Ohio's current "Supplemental Process" of sending confirmation notices only to inactive voters is neatly tailored to address a discrete portion of voters who have traditionally been regarded as posing an especially serious risk of having changed their residency, and thus being improperly registered to vote. *See, e.g.*, S. Rep. No. 103-6, at 46 (1993) (observing that, at the time the NVRA was passed, 35 states either required or permitted officials to remove voters if they had not voted over a certain period of time).

If the NVRA is construed to prohibit Ohio's practice of sending confirmation notices to verify the residency of inactive voters, then the state's ability to enforce its residency requirement will be severely impaired. For example, it would be quite ineffective

for the state to rely on the confirmation process that the plaintiffs have proposed here. *See* Brief in Opposition at 23. Under that process, the state would send an initial round of mailings to *all* registered voters, and would then send confirmation notices only to the addresses of mailings that "bounced back." This method is highly unreliable because in many cases, new residents who receive mail addressed to a prior occupant will simply discard it instead of taking the trouble to "return to sender."

The only plausible alternative is for the state to rely on the National Change of Address database (the "NCOA Process"). But because the database only captures those who file change-of-address forms with the U.S. Postal Service, the NCOA Process is woefully inadequate. According to the USPS Inspector General, "[a]s many as 40 percent of people who move do not inform the Postal Service."[2] This forty percent represents a massive number of potentially inaccurate voter registrations accumulating year over year. In 2010, Ohio had a total population of 11.54 million people, of whom 11.23 million people lived in 4.6 million households, with an average household size of 2.44 people.[3] In the same year, 1.64 million Ohioans aged one year and over moved, which indicates that roughly 655,000 households moved that year (assuming that the

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[2] U.S. Postal Service, Office of Inspector Gen., MS-MA-15-006, Strategies for Reducing Undeliverable as Addressed Mail 15 (2015), *available at* https://www.uspsoig.gov/sites/default/files/document-library-files/2015/ms-ma-15-006.pdf.

[3] U.S. Census Bureau, Summary Population and Housing Characteristics: Ohio 2, 302, 362 (2010), *available at* https://www.census.gov/prod/cen2010/cph-1-37.pdf.

moving population is a normal sample of Ohio's overall population).[4] Accordingly, based on the Postal Service's forty-percent figure, roughly 262,000 Ohio households moved without submitting change-of address-forms in 2010 alone. For these hundreds of thousands of individuals each year, Ohio is completely unable to enforce its residency requirement through the NCOA Process. This is a significant blind spot, particularly considering that the 2012 presidential election in Ohio was decided by a margin of only 166,272 votes.

Given the deficiencies of the NCOA Process, Ohio's existing Supplemental Process is a critical tool for enforcing the state's residency requirement. Unlike in *Inter Tribal Council*, forcing Ohio here to abandon its Supplemental Process would leave the state without any effective "alternative means of enforcing" its "voting qualifications." 133 S. Ct. at 2259. Consequently, Ohio has a "constitutional right to demand" the ability to employ the Supplemental Process to enforce its residency qualification. *Id.* at 2260 & n.10. At the very least, reading the NVRA to so impede the state's ability to enforce its residency requirement would raise "serious constitutional doubt," which is enough to trigger the canon of constitutional avoidance. *Id.* at 2259. Accordingly, as long as it is "fairly possible" to read the NVRA to

[4] U.S. Census Bureau, State-to-State Migration Flows (2010), *available at* https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2010/state-to-state-migration/state_to_state_migrations_table_2010.xls; U.S. Census Bureau, State-to-State Migration Flows (2011), *available at* https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2011/state-to-state-migration/state_to_state_migrations_table_2011.xls.

allow the enforcement of Ohio's Supplemental Process, the NVRA *must be* so read. *Id.*

2. The constitutional concern here is particularly acute because Ohio's voting qualifications clearly specify that anyone who fails to vote in a four-year period is not qualified to vote without re-registering. Under Article V, § 1, of the Ohio Constitution, entitled "Who may vote," "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." This rule is plainly a voter qualification because it directly regulates "*who* may vote" in federal elections, not "*how* [such] elections are held." *Inter Tribal Council*, 133 S. Ct. at 2257. Requiring voters to vote at least once every four years or re-register in order to remain qualified is no different in principle from requiring voters to be residents of the state for at least 30 days before voting, which is universally recognized as a voter qualification in practically every state. Accordingly, insofar as the NVRA prohibits states from disqualifying voters "by reason of [their] failure to vote," 52 U.S.C. § 20507(b)(2), it is unconstitutional because it infringes on Ohio's exclusive power to "[p]rescrib[e] voting qualifications," which "forms no part of the power" that is "conferred upon the national government," *Inter Tribal Council*, 133 S. Ct. at 2258.

As noted above, Ohio does not currently enforce the voter-activity qualification contained in its state constitution due to the federal mandate imposed by the NVRA. Instead, the state follows its "Supplemental Process," which removes voters from the rolls only if they are *both* inactive *and* fail to

respond to confirmation notices. Thus, the only question before the Court in the present case is whether to construe the NVRA to impose an even *greater* intrusion on state sovereignty than the state itself is willing to tolerate.

II. Congress Does Not Have Power To Directly Regulate Who Is Registered To Vote

Trenching on Ohio's power over voter qualifications cannot be justified as an exercise of Congress's power to regulate the "Times, Places and Manner of holding Elections." Article I, § 4, cl. 1. As the text makes clear, the "holding" of an "Election[]" is a discrete process that occurs at a series of particular "Times" and "Places." The "Manner of holding" the election thus involves the "mechanics" of how the voting process is conducted at the "Times" and "Places" where the election is held. *Foster v. Love*, 522 U.S. 67, 69 (1997).

Accordingly, while the federal power to regulate the time, place, and manner of holding elections is broad, it is not unlimited. It encompasses an array of procedural issues relating to *how* voting will be done, including where polling places will be located, what times they will be open, and how ballots will be cast—e.g., by machine or paper ballot, in secret or in public, in person or by mail. It also includes the "supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). But however broad this power may be to regulate the process of "*how*" voting should occur, it does not include the authority

to make substantive rules regarding "*who* may vote." *Inter Tribal Council*, 133 S. Ct. at 2257.

In the present case, Ohio's policy of disqualifying those who fail to respond to confirmation notices is a substantive rule regarding *who* is eligible to vote, and not a procedural rule regarding the time, place, or manner of *how* eligible voters cast their ballots. Indeed, clearing the rolls of non-responsive voters is an entirely separate process that occurs quite apart from the casting and counting of ballots, and thus has no conceivable effect on the "Manner" in which the actual election is held. Since Ohio's careful policy of selective deregistration is geared entirely toward determining "*who* may vote" in the state's federal elections, and not "*how* [such] elections are held," it falls completely outside the scope of Congress's power to regulate the "Manner of holding" elections. *Id.*

To be sure, this Court has assumed that Congress's power under the Elections Clause includes some "regulations relating to 'registration.'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley*, 285 U.S. at 366 (1932)); *but see id.* at 2268 (Thomas, J., dissenting) (noting that this assumption emerged in unconsidered "dicta," and has never been the subject of any "further analysis"). But even granting the assumption that Congress has *some* power to make "regulations relating to registration," those regulations can concern only the time, place, or manner of registering (or voting), as opposed to demarcating who may vote.

1. To be consistent with the text of the Elections Clause, any federal regulation of voter registration must be tied to the "Time[]," "Place[]," or "Manner" of "holding" the actual "Election." Article I, § 4, cl. 1.

This would include, for example, the basic requirement that voters pre-register, as a way of streamlining the "Manner" in which voters will be processed during the actual "holding" of the "Election[]" on election day. It would also include the requirement that voters register for a particular precinct, as a way of specifying the "Places" where they must go to cast their ballots when the election is held. This is not a freestanding power to regulate the voter-registration process, but rather a power to regulate registration only insofar as it affects the time, place, or manner of how the actual election is held.

2. Even if the "holding" of "Elections" could be construed broadly to include voter registration, then Congress's power would extend only to regulating "[t]he Times, Places and Manner of [voter registration]." Article I, § 4, cl. 1. Under this expansive interpretation, Congress could impose procedural rules dictating when, where, and how people may register. Thus, for example, the NVRA could command that voter registration be made available at the DMV (52 U.S.C. § 20504(a)(1)), or up to 30 days before an election (*id.* § 20507(a)), or through the use of a particular "Federal Form" (*Inter Tribal Council*, 133 S. Ct. at 2251). All of this would be allowed because it would involve the process of *how* people must register.

But even under this broad reading, Congress still would not have the power to dictate states' substantive rules for deregistering voters in order to enforce voting qualifications such as residency. That type of state rule has nothing to do with the *process* of registering to vote—i.e., when, where, or how

people register. Instead, it governs who should be excluded from the rolls due to the state's determination that certain people may not be *qualified* to vote. If a voter has not voted for several years and has failed to respond to confirmation notices, a presumption arises that he or she no longer meets the state's residency qualification. Requiring the deregistration of such voters has nothing to do with the time, place, or manner of registering to vote. Instead, it is a substantive rule for enforcing the state's voter qualifications regarding *who* may vote.

To be sure, legitimate regulations of the time, place, or manner of registering may have an incidental effect on who can vote, just like similar regulations of the time, place, or manner of voting: If people do not follow the proper registration procedures, then they obviously will not be able to vote, just as they cannot vote if they fail to follow the proper *voting* procedures, i.e., showing up at one's assigned precinct while the polls are open. But this does not change the fact that there is a clear analytical distinction between genuine time-place-and-manner rules that govern the *procedure* of registration (or voting), as opposed to *substantive* rules that directly govern who is registered to vote.

3. There is no direct evidence of what the Framers thought about voter registration because the practice did not exist at the time of the Founding. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 122 (rev. ed. 2009) (explaining that Massachusetts implemented the first voter-registration system in 1801). But at the very least, it is clear that "the Framers understood the Elections Clause as a grant

of authority to issue *procedural* regulations, and not as a source of power to . . . evade important constitutional restraints" regarding matters of substance. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995) (emphasis added); *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001) (The Election Clause empowers Congress "to prescribe the *procedural mechanisms* for holding congressional elections." (emphasis added)). That crucial distinction between substance and procedure should be understood in light of this Court's recognition that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257. Accordingly, Congress's procedural power to regulate how people vote cannot be allowed to intrude on the states' substantive rules regarding who can vote. That is exactly what would occur if Congress could dictate its own rules to Ohio for determining how to enforce its residency qualifications through deregistration.

* * *

The limitations described above are wholly consistent with the traditional understanding of the division between state and federal power over federal elections. Before President Clinton signed the NVRA into law in 1993, President Bush vetoed it in 1992, explaining that it "would impose unnecessary, burdensome, expensive, and constitutionally questionable Federal regulation on the States in an area of traditional State authority." 138 Cong. Rec. 17,965–66 (1992). He relied in part on the Justice Department's analysis of the NVRA, which explained that it exceeded Congress's power under the

Elections Clause because "Congress does not have plenary authority" over "elections for federal officials." 137 Cong. Rec. S5015–18 (daily ed. Apr. 24, 1991) (Department of Justice Analysis of National Voter Registration Act).

As this analysis recognizes, Congress does not have a "plenary" power over federal elections, but instead has only the limited power to enact *time-place-and-manner* regulations. In the present case, applying the NVRA to interfere with Ohio's maintenance of its voter rolls would go well beyond regulating the time, place, and manner of "holding Elections." It would even go beyond regulating the time, place, and manner of *voter registration*. Instead, it would intrude directly on the state's substantive rules regarding who is eligible to vote. Upholding the decision below would thus be clearly erroneous not only as a matter of statutory interpretation, but also as a matter of constitutional law.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Sixth Circuit in the decision below.

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CERTAIN MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*

The *Amici* Members of the Congressional Black Caucus are:

- Representative John Conyers, Jr. (Michigan 13th District), a member of Congress since 1965.

- Representative John Lewis (Georgia 5th District), a member of Congress since 1987.

- Representative Eleanor Holmes Norton (District of Columbia, at large), a member of Congress since 1991.

- Representative Jim Clyburn (South Carolina 6th District), a member of Congress since 1993.

- Representative Alcee L. Hastings (Florida 20th District), a member of Congress since 1993.

- Representative Eddie Bernice Johnson (Texas 30th District), a member of Congress since 1993.

- Representative Bobby Rush (Illinois 1st District), a member of Congress since 1993.

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. No party or entity other than the *Amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents both have consented to the filing of this brief.

- Representative Bobby Scott (Virginia 3rd District), a member of Congress since 1993.
- Representative Elijah Cummings (Maryland 7th District), a member of Congress since 1995.
- Representative Danny Davis (Illinois 7th District), a member of Congress since 1997.
- Representative Barbara Lee (California 13th District), a member of Congress since 1997.
- Representative Gregory Meeks (New York 5th District), a member of Congress since 1997.
- Representative William Lacy Clay Jr. (Missouri 1st District), a member of Congress since 2001.
- Representative David Scott (Georgia 13th District), a member of Congress since 2003.
- Representative G. K. Butterfield (North Carolina 1st District), a member of Congress since 2004.
- Representative Al Green (Texas 9th District), a member of Congress since 2005.
- Representative Keith Ellison (Minnesota 5th District), a member of Congress since 2007.
- Representative Marcia L. Fudge (Ohio 11th District), a member of Congress since 2008.
- Representative Terri Sewell (Alabama 7th District), a member of Congress since 2011.

- Representative Frederica Wilson (Florida 24th District), a member of Congress since 2011.
- Representative Donald Payne Jr. (New Jersey 10th District), a member of Congress since 2012.
- Representative Hakeem Jeffries (New York 8th District), a member of Congress since 2013.
- Representative Marc Veasey (Texas 33rd District), a member of Congress since 2013.
- Representative Bonnie Watson Coleman (New Jersey 12th District), a member of Congress since 2015.
- Representative Anthony Brown (Maryland 4th District), a member of Congress since 2017.
- Representative Val Demings (Florida 10th District), a member of Congress since 2017.
- Representative Donald McEachin (Virginia 4th District), a member of Congress since 2017.

Collectively, the *Amici* Members of the Congressional Black Caucus have served 411 years proudly representing their constituents in the United States Congress.

The *Amici* Members of the Congressional Black Caucus have a deep and abiding interest in voting rights issues. Historically, African Americans fought and died for access to the ballot. A century after the passage of the Fifteenth Amendment to the Constitution, which granted all men the right to vote, African

Americans largely remained disenfranchised. In March 1965, Representative Lewis (long before he became a Member of Congress and the Congressional Black Caucus), suffered a skull fracture after being hit with a nightstick when he joined with civil rights leaders and other peaceful protestors seeking voting rights in Selma, Alabama. The courage of those leaders, and countless others, led to the passage of the landmark Voting Rights Act of 1965.

Certain of the *Amici* were Members of Congress in 1993, when the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq.* ("NVRA") was enacted into law. These include Representatives John Conyers, John Lewis, Eleanor Holmes Norton, James Clyburn, Alcee L. Hastings, Eddie Bernice Johnson, Bobby Rush, and Bobby Scott. Indeed, Representative Conyers was one of the original co-sponsors of the bill that later became the NVRA. He enthusiastically urged his colleagues in the House to support the NVRA, colloquially called the "motor voter" bill, as a means of expanding the franchise:

> The motor-voter bill empowers traditionally unregistered citizens, the poor, working class unemployed Americans, our youth, and millions of disabled citizens.
>
> In closing, Mr. Speaker, let me say that 1993 marks 25 years since the assassination of Martin Luther King, Jr., and 30 years since the assassination of Medgar Evers, gunned down in his front yard while trying to register blacks in Jackson, MS, to vote. There can be no better tribute to their legacy than to pass the strongest motor-voter bill possible.

Conference Report on H.R. 2, National Voter Registration Act of 1993, 139 Cong. Rec. H2266 (May 5, 1993). Representative Lewis also urged his colleagues to support the NVRA to increase voter participation:

> By passing the National Voter Registration Act, Mr. Speaker, we can renew our commitment to democracy. The United States has the lowest rate of voter turnout among the world's major democracies. This legislation would make it easier and more convenient for people to vote. It will increase voter participation.

Id. at H2271. In voicing her support for the NVRA, Representative Johnson expressly noted that the bill prohibited discriminatory voter purges:

> This measure also insures that removal of names from voting rolls is done without discrimination and sets the provisions by which this can be done.

Id. at H2268.

Additional *Amici* Members of the Congressional Black Caucus were members of Congress in 2002, when the Help America Vote Act of 2002 ("HAVA") was enacted into law to remedy the profound dysfunctions in the nation's electoral systems revealed by the 2000 Presidential election. These *Amici* include Representatives Elijah Cummings, Danny Davis, Gregory Meeks, Barbara Lee, and William Lacy Clay, Jr. In the words of Representative Johnson:

> There was such an overwhelming outcry from this Nation and internationally that came to the Black Caucus after January 6, 2001, that we knew we had to act.
>
> This became the number one priority for the Congressional Black Caucus to do something about election reform. . . .
>
> The time to improve our elections system is now. We must make sure all Americans can register to vote, remain on the rolls once registered, vote free from harassment, and have those votes counted. I believe that this bill achieves those goals.

Conference Report on H.R. 3295, Help America Vote Act of 2002, 148 Cong. Rec. H7846 (Oct. 10, 2002). Representative Jackson-Lee, who was actively involved in drafting HAVA, urged her fellow members of the House to support the bill because it was intended to reduce, not expand, purges of eligible voters from voter registration rolls:

> Although purging of voter rolls may be a well-intentioned attempt to remove inappropriate votes from being cast—such purging has rarely, if ever, been done effectively and fairly. Done improperly, purging can be an expensive tool for discrimination or mistreatment. Consistently through the history of our nation, purging has been a mechanism for silencing minorities, and the socio-economically disadvantaged.
>
> In Florida alone, thousands of eligible voters have been misidentified as being felons who are

> unable to vote: 3,700 before election 1998, and 11,000 before election 2000. There is no reason to think that this is a Florida-specific problem. This means that perhaps hundreds of thousands of American citizens, living in the richest Democracy in the world, are having their fundamental right to vote stripped due to clerical errors. This is absolutely unacceptable. I have fought to preserve language in this bill that will ensure that voters are not unfairly purged from the voting rolls.

Id. at H7849.

The *Amici* Members of the Congressional Black Caucus continue to support policies that would protect, not impede, access to crucial voting rights for all American citizens, including enforcement of voting rights through challenges to improper voter registration purges and other means of voter disenfranchisement. Those policies include, among others, restoration of the full protections of the Voting Rights Act; enforcement of voting rights through challenges to improper voter registration purges and other means of voter disenfranchisement; an end to modern-day poll taxes in the form of burdensome voter identification laws; and modernization of voter registration and election administration procedures.

More recently, members of the Congressional Black Caucus have introduced legislation such as the Voter Empowerment Act of 2017, the Voting Rights Enhancement Act of 2017, the Same Day Registration Act of 2017, the Redistricting and Voter Protection Act of 2017, the Election Infrastructure and Security Promotion Act of 2017, the Election Integrity Act of 2016,

and the Voting Rights Amendment Act of 2017. Additionally, in May 2016, Members of the Congressional Black Caucus formed the Congressional Voting Rights Caucus, whose goal is to educate the public on voter suppression, inform constituents on voter rights, and create and advance legislation that blocks current and future suppressive and discriminatory tactics that deny American citizens the right to vote. Thirty-one Members of the Congressional Black Caucus (and nineteen of the *Amici*) are also members of the Congressional Voting Rights Caucus.

SUMMARY OF ARGUMENT

Petitioner tries to defend voter registration purges triggered by non-voting as a "longstanding state practice." *Brief for the Petitioner* at 2. "Longstanding" as Ohio's practice may be, Congress intended to uproot it in the NVRA. The Department of Justice and the Federal Election Commission acknowledged that Congressional mandate when they repeatedly put states on notice—in lawsuits, written reports, and otherwise—that the practice of targeting non-voters with confirmation mailings to initiate the purge process was either prohibited by the NVRA or, at best, was of doubtful validity.

In the years after the NVRA was enacted, bills seeking to amend the statute to allow non-voters to be targeted for registration purges were introduced in both the House and Senate, further demonstrating that the NVRA did not already permit the practice. None of those bills, however, was enacted. When Congress enacted HAVA in 2002, it repeatedly confirmed, in both the text of the statute and in the Conference Report, that the NVRA's substantive and procedural

protections would be preserved. The Federal Election Commission, the Department of Justice and Members of Congress all understood that the targeting of non-voters for confirmation mailings violated the NVRA's ban on purges of non-voters; the "clarification" of the NVRA in HAVA cannot be construed to effect that change implicitly in light of the previous failures to effect it explicitly.

The Sixth Circuit's decision correctly interpreted the NVRA and HAVA when it invalidated Ohio's "Supplemental Process" of targeting non-voters for confirmation mailings and eventual removal from the rolls; its decision should be affirmed.

ARGUMENT

I. The NVRA Was Intended to End the Practice of Targeting Non-Voters for Registration Purges.

As recognized by the Sixth Circuit, "Congress' stated purposes in enacting the NVRA were, inter alia, 'to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained.'" Pet. App. 10a (citing 52 U.S.C. § 20501(b)). When Congress considered the NVRA in 1993, it had been presented with evidence that the means then used by most states to purge voter registration rolls—the routine elimination of non-voters—acted to discriminate against poor and minority voters:

> While most States use the procedure of removal for non-voting merely as an inexpensive method for eliminating persons believed to

> have moved or died, many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

S. Rep. No. 103–6, at 17–18 (1993); *see id.* at 17 (voter list maintenance processes "must be structured to prevent abuse which has a disparate impact on minority communities."). Congress intended that individuals should remain registered to vote so long as they remained eligible to do so, without regard to whether, or how often, they actually exercised that right:

> One of the purposes of this bill is to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction. The Committee recognizes that while voting is a right, people have an equal right not to vote, for whatever reason. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election.

Id. at 17.

In response to these concerns, the NVRA imposed several substantive prohibitions on the process of purging ineligible voters, set forth in Section 8 of the statute. First, subsection (a) provides the limited grounds on which a voter may be removed from the registration rolls: upon the registrant's request,

death, criminal conviction or mental incapacity (if provided by state law) or "a change in the residence of the registrant, in accordance with subsections (b), (c) and (d)." 52 U.S.C. § 20507(a)(3)–(4). Failure to vote for any period of time, no matter how long, is not a permissible ground for removing voters from the registration rolls. Subsection (b), as originally enacted, required that any voter registration list maintenance process:

> (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*); and
>
> (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote...

52 U.S.C. § 20507(b)(1)–(2).

These provisions were included in the bill "[i]n response to the concerns of various witnesses representing civil rights organizations . . . to prevent the discriminatory nature of periodic purges, which they assert appear to affect blacks and minorities more than others." S. Rep. No. 103–6 at 20. The House Committee on Rules and Administration "concluded that language on list verification procedures was appropriate, specifically prohibiting any registered voter from being removed from the rolls for failure to vote." H. Rep. No. 103–9 at 5 (1993). Thus, in the NVRA, Congress recognized and specifically intended to address the discriminatory impact of targeting non-voters for removal from lists of registered voters.

II. Congress Has Not Amended the NVRA To Permit Non-Voters To Be Targeted for Registration Purges.

The NVRA was signed into law on May 20, 1993. Congress directed that the Federal Election Commission "shall provide information to the States with respect to the responsibilities of the States under this Act," and that it also report to Congress every second year on "the impact of this Act on the administration of elections for Federal office during the preceding 2-year period." National Voter Registration Act of 1993, Pub. L. No. 103–31, § 9, 107 Stat. 77 (1993) (prior to 2002 amendment). The Federal Election Commission's first biennial report to Congress in 1995 explained the magnitude of the transition facing state registrars, because the overwhelming majority of them had been conducting voter registration purges by means now "specifically prohibited" by the NVRA:

> [T]he 38 states covered by this report took a more common approach to purging their voter registration lists—an approach specifically prohibited by the NVRA. Twenty-eight (28) of the states used failure to vote within a specified time frame (2 to 5 years) as their principal purging method purging the list each year or at each general election. And twenty-five (25) of these routinely notified the registrant by mail of the impending purge of their names."

FEC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1993-1994* (1995) at 8; *see also* FEC, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems*

and Solutions Discovered 1995-1996 at 5–1 (March 1998) ("Prior to implementing the NVRA, local jurisdictions in most States relied on the removal of those who failed to vote as the primary method of keeping voter registration lists up-to-date. Under the Act, this procedure could no longer be used; many States had to develop other methods to identify and remove those who had died or moved . . . ."). Significantly, the Federal Election Commission deemed this "common approach" of purging non-voters to violate the NVRA even though 25 of the 28 states using that approach *also* gave non-voters notice by mail of the impending removal. The argument made here by Petitioner and (in a notable about-face) the Department of Justice—that *only* the practice of purging non-voters without notice was intended to be prohibited by the NVRA—is palpably wrong. *See Brief for the Petitioner* at 28–29; *Brief for the United States as Amicus Curiae Supporting the Petitioner* at 31.[2]

In its first publication providing "information to the States with respect to [their] responsibilities" under the NVRA, the Federal Election Commission emphasized that "[a]lthough most jurisdictions remove

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[2] Both Petitioner and the Department of Justice base their argument on an ambiguous reference in one sentence in the Congressional Budget Office's cost analysis, reproduced in the House and Senate Committee Reports for the NVRA: "These states could not continue *this practice* under the bill." S. Rep. No. 103–6 at 46 (emphasis added); H. Rep. No. 103–9 at 30 (emphasis added). In light of the Federal Election Commission's unequivocal statement that all non-voter purges—both with and without notice—were "specifically prohibited" by the NVRA, "this practice" must refer to *all* non-voter purges, not merely those executed by a small minority of states without giving any notice.

the names of individuals from the voter registration list after their failure to vote within a specified time frame, the NVRA prohibits this practice." FEC, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches and Examples* (1994) at 5–5. The Federal Election Commission further advised states that registrars could use the confirmation process of section 8(d)(2) with "any registrant whom the registrar has legitimate reason to believe has changed address." *Id.* at 5–8. The guide identified three possible ways of using a non-voter list to trigger such confirmation mailings: first by sending non-forwardable forms to non-voters, then confirmation mailings to those non-voters whose mailing was returned; second; by running non-voters' names against the U.S. Postal Service's "National Change of Address Files"; and third, by sending confirmation mailings to non-voters. *Id.* at 22–23. At that early date, six months after the NVRA had been adopted and before it had even gone into effect, the Federal Election Commission cautioned that the last of these options is "considered by some advocates to violate the provisions of the Act." *Id.* at 23.

The Department of Justice, charged with enforcement of the NVRA under Section 9 of the statute, *see* 52 U.S.C. § 20510, weighed in on this question and determined that the practice of targeting non-voters for confirmation mailings ran afoul of the NVRA. As chronicled in the Brief for the United States as Amicus Curiae submitted to the Sixth Circuit in this case, beginning in 1994 and continuing through 2016, the Department of Justice consistently challenged the

practice of targeting non-voting registrants for confirmation mailings in the absence of some indication that the registrant had moved.

By the time of its second report to the states, in March 1998, the Federal Election Commission expressed its own doubts about the legality of the practice of targeting non-voters for confirmation mailings, as Ohio does in the "Supplemental Procedure." In response to a survey of state registrars conducted by the Federal Election Commission, two states proposed to "allow all registrars to target non-voters or those who have not maintained contact during a specific period of time to receive forwardable confirmation mailings." *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* at 5–44 (March 1998). The FEC marked that proposal with a footnote: "Appears to require federal legislation." *Id.* at 5–46.[3]

Petitioner claims that in HAVA, Congress "sided with the states" and gave them the authority to target non-voters for confirmation mailings. *Brief for the Petitioner* at 36. But the text and legislative history of HAVA belie the suggestion that the statute was a vehicle for making any substantive changes to section 8 of the NVRA. To the contrary:

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[3] The Federal Election Commission also reported that the Joint Election Officials Liaison Committee and National Association of County Recorders and Clerks had "suggested a legislative change to the NVRA to implement this approach" of targeting non-voters with confirmation mailings. *Id.* at 5–22.

- "[N]othing in [HAVA] may be construed to authorize or to require conduct prohibited under [the NVRA], or to supersede, restrict or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

- HAVA's specific amendment to the language of section 8(d)(2) is denominated a "clarification," not a revision, modification or limitation. *Help America Vote Act of 2002*, Pub. L. No. 107-252, 116 Stat. 1666, § 903 (2002).

- HAVA's mandate that states remove "ineligible" registrants from the official list of registered voters must be implemented "consistent with the [NVRA]." 52 U.S.C. § 21083(a)(4)(A).

- The Conference Report on HAVA gave comfort to Members of Congress being asked to vote on the bill that it would not "undermine the [NVRA] in any way." H.R. Rep. No. 107–730 at 81 (2002).

- HAVA does not explicitly say that confirmation notices under section 8(d)(2) may be targeted to non-voters in the absence of some evidence that the non-voter has changed residence. *See* 52 U.S.C. § 20507(b)(2).

Tellingly, Members of Congress have also acknowledged that the NVRA does not permit states to target non-voters for confirmation mailings, because they have unsuccessfully sought to amend it to provide that authority both before and after the passage of HAVA. In 1997, Senator John Warner and Representative Bob Goodlatte each introduced a bill that would have amended the NVRA in several respects, including to permit the very practice that Ohio adopted in the

"Supplemental Procedure." Each of the Warner and Goodlatte bills included a provision, openly titled "Removal of certain registrants from official list of eligible voters" which sought to add the following language to section 8(d) of the NVRA:

> (3)(A) At the option of the State, a State may remove the name of a registrant from the official list of eligible voters in elections for Federal office (and, if necessary, correct the registrar's record of the registrant's address) on the ground that the registrant has changed residence if—
>
> (i) the registrant has not voted or appeared to vote in an election during the period beginning on the day after the date of the second previous general election for Federal office held prior to the date the confirmation notice described in subparagraph (B) is sent and ending on the date of such notice;
>
> (ii) the registrant has not voted or appeared to vote in any of the first two general elections for Federal office held after the confirmation notice described in subparagraph (B) is sent; and
>
> (iii) during the period beginning on the date the confirmation notice described in subparagraph (B) is sent and ending on the date of the second general election for Federal office held after the date such notice is sent, the registrant has failed to notify the State in response to the notice that the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction.

> (B) A confirmation notice described in this subparagraph is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which a registrant may state his or her current address, together with information concerning how a registrant can continue to be eligible to vote if the registrant has changed address to a place outside the registrar's jurisdiction and a statement that the registrant may be removed from the list of eligible voters if the registrant does not respond to the notice. . . .

S. 1561, § 703, 105th Cong. (1st sess. 1997); H.R. 2076, § 3, 105th Cong. (1st sess. 1997). Senator Warner introduced this proposal again in 1999. *See* S. 1107, § 703, 106th Cong. (1st sess. 1999). Unlike HAVA, which does not state how registrars might select the registrants who would get notices that could lead to their removal from the voter registration list, these proposed bills explicitly stated that non-voters could be targeted.

None of the proposed iterations of this bill was approved by the House or Senate.[4] Still, the bills' detailed elaboration of the process of targeting non-voters for registration purges—and their forthright titles—shows that before HAVA was introduced, Congress knew how to go about revising section 8 of the

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[4] Representative Goodlatte sought to add this provision to a proposed bill on campaign finance reform, but the amendment was soundly defeated by a vote of 165 to 260 on July 30, 1998. H. Amdt. 747 to H.R. 2181, 105th Cong. (2nd sess. 1998); *Bipartisan Campaign Integrity Act of 1997*, 144 Cong. Rec. H6811 (Jul. 30, 1998).

NVRA to permit that procedure, if that was its intention.

Indeed, before HAVA was enacted, the House of Representatives defeated a bill that would have sanctioned much less draconian treatment of non-voters. In 1998, Representative William Thomas introduced H.R. 3581, which would have permitted state registrars to target non-voters with additional mailings. H.R. 3581, § 512, 105th Cong. (2nd sess. 1998). Rather than removing such a registrant from the list of registered voters, this bill would have required the registrant to whom the notice was sent to provide "oral or written affirmation of the registrant's identification and address . . . before the registrant is permitted to vote in a subsequent Federal election." *Id.* Only seventy-four Representatives voted in favor of this bill; 337 Representatives (including several of the *Amici* Members of the Congressional Black Caucus) voted against it. *Campaign Reform and Election Integrity Act of 1998*, 144 Cong. Rec. H1764-02 (Mar. 30, 1998). And three years after HAVA was enacted, Representative Charles Dent introduced yet another unsuccessful bill designed to sanction the practice of targeting non-voters for registration purges. H.R. 2778, 109th Cong. (1st sess. 2005).

Each of these unsuccessful attempts to amend the NVRA to permit the targeting of non-voters for registration purges confirms that the NVRA as originally enacted prohibited the practice, and that HAVA did not surreptitiously modify the NVRA to permit it. *See Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("we decline to read any implicit directive into that Congressional silence").

CONCLUSION

For the foregoing reasons, as well as those offered by Respondents, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Common Cause is a nonpartisan, grassroots, citizens' organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people.[1] Founded by John Gardner in 1970 as a "citizens' lobby," Common Cause has over one million members nationwide and has local chapters in 30 States, including in Ohio. Common Cause has been a leader in the fight for open, honest, and fair elections. Common Cause has also been a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties. Common Cause is currently challenging Georgia's voter removal process which is similar to the procedure at issue here.

SUMMARY OF THE ARGUMENT

The outcome of this case will not affect only Petitioner and the state of Ohio. Nor will it just affect the hundreds of thousands of eligible voters in Ohio who

[1] This *amicus* brief is filed in support of respondents with the consent of the parties. Petitioner and respondents have granted blanket consent. Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part and that no person other than the *amicus* paid for or made a monetary contribution toward its preparation and submission.

have been and will be unlawfully removed from the voter registration rolls by virtue of Petitioner's illegal practices. What the Court decides here will have ramifications across the country, potentially resulting in the removal of millions of eligible Americans from voter registration rolls, preventing them from exercising their constitutionally protected right to vote in upcoming elections – at a time when collective participation is already too low for a democracy of our kind.

Indeed, in a handful of other states, voters are currently being illegally purged from voter registration rolls because of practices comparable to those of Petitioner. In many, if not most, instances, these citizens may not become aware that they are no longer registered – and thus no longer able to cast a ballot in the next election – until they arrive at the polls on Election Day. By the time they arrive and learn of their removal, it is too late to remedy the problem; these individuals must then sit out that election. (This is so because most of the states subject to the requirements of the NVRA do not have Election Day or same day registration on their legislative books.)

Voters in Georgia, like those in Ohio, face that fate. Georgia has a voter removal program that is substantially identical to the one addressed in this case. Georgia has used this program to remove hundreds of thousands of eligible voters from its rolls over the course of just a few federal election cycles. These purges violate the text of the NVRA because they permit elections officials to identify for purging eligible,

registered voters who have not voted for a specified period of time – despite the fact that such temporary inactivity provides no indication that the individuals have since moved from their homes or otherwise become ineligible to vote. Such temporary inactivity only indicates that an eligible registered voter has, for one of any number of reasons, opted against casting a ballot – a right as American as the right to vote itself – or was prevented from doing so, due to any number of obstacles or external factors.

In 2016, this *amicus*, among others, sued the Georgia Secretary of State to prevent him from illegally removing voters from the rolls for such inactivity. In Georgia, a comparable voter removal program targets individuals who failed to vote for a consecutive three-year period. The case is currently pending in the Eleventh Circuit. *Common Cause and Georgia NAACP v. Kemp*, No. 17-11315 (11th Cir. filed March 23, 2017). After the Supreme Court granted certiorari in this case, Georgia's Secretary of State purged an additional 590,000 individuals from the voter registration rolls – many of whom were purged precisely because they had been placed on the "inactive" list due to not having voted during a three-year period. Practices like those of Petitioner and the Georgia Secretary of State violate the NVRA's express terms and fly directly in the face of the NVRA's purpose. As such, they must be prevented in any state.

ARGUMENT

I. REGARDING REMOVAL OF VOTERS, THE NVRA AND HAVA HAVE TWO PURPOSES: TO PERMIT THE REMOVAL OF ONLY INELIGIBLE VOTERS AND TO ENSURE THAT NO VOTER IS REMOVED FOR FAILING TO VOTE.

The National Voter Registration Act (NVRA) and the related Help America Vote Act (HAVA) were both designed to increase voter registration and participation. The NVRA's express legislative purposes include "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2). HAVA was also intended to increase voter participation. It was enacted to "alleviate 'a significant problem voters experience, which is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.'" *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. Rep. No. 107-329 at 38 (2001) (alterations adopted)).

Notably, HAVA explicitly reaffirmed the NVRA's efforts to prevent improper voter removal. *See* 52 U.S.C. § 21145(a)(4) ("[N]othing in [HAVA] may be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA]."); *see also* H.R. Rep. No. 107-329 at 37 ("[R]emoval of those deemed ineligible must be done in a manner consistent with the [NVRA]. The

procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [HAVA] leaves NVRA intact, and does not undermine it in any way.").

For purposes of removing voters from a State's rolls, these statutes have two touchstones. First, they are targeted *exclusively* at removing *ineligible* voters. *See* 52 U.S.C. § 20507(a)(4) (NVRA requirement that States "remove the names of *ineligible* voters") (emphasis added); *id.* § 21083(a)(4)(A) (HAVA requirement that States "remove registrants who are *ineligible* to vote.") (emphasis added). Nothing in these statutes authorizes the removal of *eligible* voters – indeed, doing so would contradict the stated purposes of "increasing the number of eligible citizens who register to vote" and "enhancing [voter] participation."

Second, both federal statutes expressly prohibit States from removing a voter solely because he or she failed to vote. *See id.* § 20507(b)(2) (NVRA requirement that no voter be removed "by reason of the person's failure to vote"); § 21083(a)(4)(A) (HAVA requirement that "no registrant may be removed solely by reason of a failure to vote"). Failure to vote in any election, as indicated by the language of both the NVRA and HAVA, in no way calls into question the voter's eligibility.

II. UNDER THE NVRA, CONFIRMATION NOTICES MAY ONLY BE SENT TO INDIVIDUALS WHO APPEAR TO HAVE MOVED, AS DETERMINED BY RELIABLE EVIDENCE; NON-VOTING CANNOT AMOUNT TO RELIABLE EVIDENCE.

A. The NVRA Contains A Number Of Voter-Removal Requirements That Must Be Met Before A State May Initiate The Purging Process, And The State Of Ohio, Like Every Other State Covered By The NVRA, Must Meet Every Requirement.

The relevant NVRA section, 52 U.S.C. § 20507, contains a number of provisions that limit a State's ability to remove voters from its voter rolls. It states:

> (a) In general
>
> In the administration of voter registration for elections for Federal office, **each State shall** –
>
> . . .
>
> (3) provide that the name of a registrant **may not be removed from the official list of eligible voters except** –
>
> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) **as provided under paragraph (4);**

(4) conduct a **general program** that makes **a reasonable effort** to remove the names **of ineligible voters** from the official lists of eligible voters by reason of –

(A) the death of the registrant; or

(B) **a change in the residence of the registrant, in accordance with subsections (b), (c), *and* (d)**;

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) **shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except*** that nothing in this paragraph may be construed to prohibit a State from using the procedures **described in subsections (c) *and* (d)** to remove an individual from the official list of eligible voters if the individual –

(A) has not either notified the applicable registrar (in person or in writing) or responded during the

period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State *may* meet the requirement of subsection (a)(4) by establishing a program under which –

(A) *change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed*; and

(B) if it appears from information provided by the Postal Service that –

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not

in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to *confirm* the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude –

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant –

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and preaddressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period

> the registrant's name will be removed from the list of eligible voters.
>
> (B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.
>
> (3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

52 U.S.C. § 20507 (emphasis added).

Subsection (a) provides requirements for how the States maintain their voter lists, setting out a limited number of circumstances in which previously qualified registrants, who have since become ineligible due to mental incapacity, felony conviction, death, or change in address, may be removed. To determine whether a registrant has since become disqualified due to death or a change in address, the State must adopt a *general* program that makes a reasonable effort to determine the change, unless, in the case of a change of address, the registrant notifies the elections office him or herself. Subsection (a)(3) prohibits a state from removing a voter's name unless certain conditions are met. The only voter-removal condition that is applicable here is subsection (a)(3)(C), which allows a state to remove a voter's name if the state complies with subsection (a)(4).

Subsection (a)(4), in turn, requires a "general program that makes a *reasonable effort* to remove the names of *ineligible* voters." (emphasis added). This sets the general rule applicable to this case: A State's voter removal program must be a "*reasonable effort*" to remove "*ineligible* voters."

More specifically, to remove a voter because he or she has changed residence, subsection (a)(4)(B) also requires that the State comply with subsections "(b), (c) *and* (d)." *Id.* at § 20507(a)(4)(B) (emphasis added). These three subsections combine to form a set of protections to prevent improper removal of eligible voters. Based on the use of the word "and," any removal of voters must comply with all three subsections. Subsection (b) requires (1) that any state activity must be uniform, nondiscriminatory and comply with the Voting Rights Act; and (2) that any state activity ***"shall not result in the removal . . . by reason of the person's failure to vote, except*** that nothing in this paragraph may be construed to prohibit a state from using the procedures described in subsections (c) ***and*** (d) to remove an individual. . . ." *Id.* at § 20507(b)(2) (emphasis added).

Thus, for purposes of removing *ineligible* voters based on change of address, subsection (b) establishes the general rule that voters may not be removed for failure to vote. But it provides that a State is not prohibited from using the procedures in subsections "(c) *and* (d)." Subsection (c), entitled "Voter removal programs," provides a permissive safe harbor where states

"*may*" comply with subsection (a)(4) by initiating a removal process based on the USPS change of address database.

Subsection (d) is different. Unlike subsection (c), it is not a permissive safe harbor. Nowhere does the NVRA state that compliance with subsection (d)'s notice process alone meets the requirements of subsection (a)(4). Had Congress intended the subsection (d) notice process to be a safe harbor like subsection (c), it would have said so.

Instead, subsection (d)'s notice process is an additional restriction on voter removal, which expressly prohibits a State from removing a voter based on purported change of address without sending the voter a specific written notice and waiting the prescribed period of time. (It says: "A state *shall not*. . . ."). Given what the statute actually says, subsection (d) cannot be a standalone safe harbor, but is instead an *additional restriction* on any voter removal program based on change of address. States must meet this requirement in addition to the others contained in 52 U.S.C. § 20507. This conclusion is buttressed by the statute's description of subsection (d): It says subsection (d)'s notice requirement is used "to ***confirm*** the [voter's] change of address" before final removal. *Id.* at § 20507(c)(1)(B)(ii) (emphasis added). Thus, subsection (d) cannot be the initial basis for concluding that a voter has changed address; it is merely an additional "confirm[ation]" of some *other* indicia of a change of address; it is a means of confirming other independent information that a voter has moved.

The language of subsections (a)(4)(B) and (b)(2) likewise demands this conclusion. Both of those subsections use the word "*and*" in requiring compliance with subsection (d). Subsection (a)(4)(B) requires change of residence programs to be conducted "in accordance with subsections (b), (c) ***and*** (d)." (emphasis added). Subsection (b)(2) says that the prohibition on removing non-voters may not be construed to prohibit a State program that uses "the procedures described in subsections (c) ***and*** (d)." (emphasis added).

Reading the entire statute makes clear that a State may not remove a voter unless it complies with certain requirements. To satisfy these requirements, a voter removal program based on change of residence can ***either*** fall into the subsection (c) safe harbor (in which case it must comply with subsection (c) and the notice requirements of (d)), ***or*** it must comply with all of the other requirements, which include subsection (a)(4)'s requirement that it be a "reasonable effort" to remove "ineligible" voters; subsection (b)'s requirement that it be uniform, non-discriminatory and "***not*** result in the removal" of a voter for failure to vote; and subsection (d)'s notice requirements. If Petitioner's interpretation of the statute were adopted, or his practice deemed permissible, then (b)'s explicit prohibition on removals based on failure to vote would be utterly meaningless in the change-of-address context. But Congress specifically added that language, and it may not be deemed superfluous.

B. HAVA Did Not Amend The NVRA's Prohibition Against Using Non-Voting To Purge Voters.

HAVA directly supports the plain language reading of the NVRA. The full text of 52 U.S.C. § 21083(a)(4)(A) states:

> The State election system **shall** include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance that **makes a reasonable effort to remove registrants who are ineligible** to vote from the official list of eligible voters. Under such system, **consistent with the [NVRA]**, registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office **shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote**.

(emphasis added).

First, HAVA reaffirms that any state program must make a "reasonable effort" to remove "ineligible" voters. Any analysis that ignores this requirement is erroneous.

Second, HAVA does not repeal any of the requirements of the NVRA. Instead, it does the exact opposite: It requires that any voter removal program must be "consistent with the NVRA."

Third, this provision repeats that "no registrant may be removed ***solely*** by reason of a failure to vote."

The statute provides that voters may be removed if they "have not responded to a notice and . . . have not voted in 2 consecutive general elections for Federal office." However, if compliance with these two provisions alone were enough to satisfy the statute, then the language in (a)(4)(A)'s final clause, which prohibits removing voters solely for failing to vote, would be meaningless. That cannot be. That final clause – "except that no registrant may be removed solely by reason of a failure to vote" – is an *exception* to a State's ability to remove "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office." *Id.* at § 21083(a)(4)(A). Satisfying those two conditions is not sufficient; the statute requires more: States must also comply with the exception. If complying with both conditions were enough, then the exception would have no meaning. Thus, HAVA supports the conclusion that the requirements of the NVRA must be met.

III. GEORGIA'S LAW, LIKE OHIO'S, TARGETS INDIVIDUALS WHO FAILED TO VOTE, AND "RESULTS IN THE REMOVAL OF" MASSIVE NUMBERS OF THOSE VOTERS "BY REASON OF THEIR FAILURE TO VOTE," IN DIRECT VIOLATION OF THE NVRA.

After the NVRA was enacted in 1993, Georgia (along with a handful of other states) adopted a new

election code in an effort to conform to the NVRA's requirements. Except for O.C.G.A. § 21-2-234, Georgia's voter-removal programs comply with the NVRA. *See, e.g.*, O.C.G.A. § 21-2-231(a) (removal of voters for felony convictions); *id.* 21-2-231(b) (mental incapacity); *id.* § 21-2-231(d) (death); *id.* § 21-2-232(b) (registration to vote in another state); *id.* § 21-2-233 (change of residence based on information from the USPS change-of-address database, in compliance with the USPS Safe Harbor Procedure in subsection 8(c) of the NVRA).

But one of Georgia's voter-removal programs, codified at O.C.G.A. § 21-2-234, directly violates the NVRA like the Ohio program at issue here. Section 234 requires the Georgia Secretary of State to initiate voter-removal proceedings against voters who have failed to vote (or make other voting-related "contact" with election officials) for three consecutive years, without requiring a showing of more. Section 234 provides in pertinent part:

> In the first six months of each odd-numbered year, the Secretary of State shall identify all electors whose names appear on the list of electors with whom there has been no contact[2]

---

[2] Georgia's Election Code defines "no contact" as follows:

> [T]he elector has not filed an updated voter registration card, has not filed a change of name or address, has not signed a petition which is required by law to be verified by the election superintendent of a county or municipality or the Secretary of State, has not signed a voter's certificate, and has not confirmed the elector's continuation at the same address.

§ 21-2-234(a)(1); *see also id.* § 21-2-235(b).

> during the preceding three calendar years and who were not identified as changing addresses under Code Section 21-2-233.

After identifying voters who have made "no contact" – which almost exclusively consists of individuals who have not voted during the specified time period – the Secretary sends address-confirmation notices to those voters. A voter who receives an address-confirmation notice must respond within 30 days.[3] This is true even "if the elector has not changed addresses" – and therefore is still eligible to vote. If the voter fails to respond within 30 days, his or her name is transferred to a list of "inactive" voters. O.C.G.A. § 21-2-234(c)(2). If he or she fails to vote in the next two general elections, the voter will be removed from the voter-registration rolls. *Id.* § 21-2-235.

The Georgia law is no small matter. Indeed, if allowed to continue, laws like this – and the one at issue in Ohio – can wipe out any increase in voter registration, despite the introduction of reforms such as online voter registration that aim to remove longstanding barriers to registration and voting. Moreover, practices

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While this definition of "no contact" does not expressly include failure to vote, "sign[ing] a voter's certificate" is the equivalent of voting in Georgia. *See* O.C.G.A. § 21-2-431(a) ("At every primary and election, each elector who desires to vote shall first execute a voter's certificate. . . .").

[3] The U.S. Election Assistance Commission reports that the national average return rate of address-confirmation notices is only 20%. EAC Report, available at https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf, at 23.

like those used in Georgia, Ohio, and elsewhere disenfranchise otherwise eligible voters from exercising their constitutional right to vote; by the time many of these citizens learn of their removals from the voter registration rolls it is simply too late for them to re-register and vote, particularly because of many states' registration deadlines. Targeting voters for simply having failed to vote violates the NVRA's text and its purposes of expanding the electorate, ensuring greater participation in our country's elections.

CONCLUSION

The relevant provisions of the NVRA are straightforward. Pursuant to subsection (a)(4), States must make a reasonable effort to remove ineligible voters only. Pursuant to subsection (b), they cannot remove voters based on failure to vote. And before a State removes any voter, it must provide the notice required by subsection (d). These requirements can be met by showing a reasonable effort, targeted at ineligible voters, that does not result in their removal for not voting. Or, if a state wants a safe harbor, it may simply comply with subsection (c), and engage in a general program that relies on reasonable data such as that provided by USPS for identifying probable changes of address, while still providing the notice required by subsection (d). That would suffice as a matter of law for purposes of keeping the registration rolls up to date with respect

to potential changes of address. But a State's identification and targeting of non-voters for the purging process violates both the text and purposes of the NVRA and HAVA.

Respectfully submitted,

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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52 U.S.C. § 20507(b)(2) 1, 3, 14, 15, 18

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2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836). 8, 11, 12, 16

3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) ... 8, 11, 12

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The Federalist No. 57 (Madison) (Clinton Rossiter ed., rev. ed. 1999) 9

The Federalist No. 59 (Hamilton) (Clinton Rossiter ed., rev. ed. 1999) 10

Letter from Timothy Pickering, Delegate, Pa. Ratifying Convention, to Charles Tillinghast (Dec. 24, 1787), *quoted in* Charles W. Upham, 2 *The Life of Timothy Pickering* (1873) 6, 13

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Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 9

2 *Records of the Federal Convention* (Max Farrand ed., 1911) 3, 7, 9, 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

SUMMARY OF ARGUMENT

Using its authority under the Elections Clause, Congress passed the National Voter Registration Act (NVRA), which prohibits state voter purge laws that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote . . . ." 52 U.S.C. § 20507(b)(2). The NVRA's command reflects the basic constitutional principle that individuals may not be stripped of their fundamental rights—including the right to vote—because they do not exercise them. "'No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue.'" S. Rep.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

103-6, at 17 (1993) (citation omitted). Ohio, however, asserts that, despite what the NVRA says, states may purge qualified voters from the voting rolls simply because they did not vote during a six-year period and did not respond to a request to confirm their eligibility. According to Ohio, the NVRA must be interpreted to allow for this vote purging to avoid raising doubts about its constitutionality. Pet'r Br. at 46-57. Ohio's argument cannot be squared with the text and history of the Elections Clause.

More than two centuries ago, our Constitution's Framers concluded that the federal government must have the final say over the mechanics of federal elections. After lengthy debates over the Elections Clause—beginning at the Constitutional Convention in Philadelphia, continuing in the state ratifying conventions, and through the debates over the Amendments to the Constitution proposed in 1789—the Framers conferred on Congress the power to "make or alter" state election law in order to protect the right to vote in federal elections and allow Congress to set uniform rules for the time, place, and manner of those elections. Where Congress invokes its power to "make or alter" state law, federal law expressly preempts state time, place, and manner regulations, ensuring that states do not interfere with the people's right to vote for their federal representatives.

As this Court has recognized, the Elections Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress," *Arizona v. Inter Tribal Council, Inc.*, 133 S. Ct. 2247, 2253 (2013), and it provides a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate," *Ariz.*

State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2672 (2015). The Framers wrote the Elections Clause using "words of great latitude," because "it was impossible to foresee all the abuses that might be made of the [States'] discretionary power." 2 *Records of the Federal Convention* 240 (Max Farrand ed., 1911). As this Court has repeatedly held, "[t]he Clause's substantive scope is broad. 'Times, Places, and Manner' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including . . . regulations relating to 'registration.'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Using its Elections Clause authority, Congress took account of the "continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials," *id.* at 2261 (Kennedy, J., concurring), giving states authority to remove individuals from the rolls because of "the death of the registrant" or "a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(A), (B). But the NVRA denied states the authority to strip a citizen of the right to vote "by reason of the person's failure to vote." *Id.* § 20507(b)(2). While Congress permitted states to use failure to vote as part of the process of *confirming* a voter's change of residence, *id.* § 20507(c), (d), it prohibited states from stripping the right to vote from inactive voters on the basis of their choice not to vote. In making that judgment, Congress acted for reasons at the very core of the Elections Clause and used its express power to "make or alter" state law in order to "avoid requiring voters to re-register unnecessarily." U.S. Br. at 3. As the United States concedes, "Congress concluded that individuals who fail to vote 'may not have moved or

died' and that eligible individuals should not be removed from the rolls 'merely for exercising their right not to vote.'" *Id.* at 5 (citation omitted). Exercising its power under the Elections Clause, Congress determined that purges targeting inactive voters were an unjustifiable barrier to the right to vote in federal elections. Ohio disagrees, but "the Constitution explicitly gives Congress the final say" on that question. *Foster v. Love*, 522 U.S. 67, 72 (1997). Because Ohio's purge of inactive voters cannot be squared with the command of the NVRA, Resp'ts Br. at 24-51, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE ELECTIONS CLAUSE GIVE CONGRESS BROAD POWER TO OVERRIDE STATE LAW IN ORDER TO PROTECT THE RIGHT TO VOTE IN FEDERAL ELECTIONS.

A. The Elections Clause Is Unique in Its Structure, Breadth, and the Power It Grants to Congress.

More than two centuries ago, the Framers of our Constitution "split the atom of sovereignty," creating "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution creates a national government that "owes its existence to the act of the whole people who created it," and establishes "a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 839, 845 (Kennedy, J., concurring).

In setting forth the respective powers of federal and state governments to regulate federal elections in the Elections Clause, the Framers gave paramount power to Congress, recognizing that "the National Government . . . must be, controlled by the people without collateral interference by the States." *Id.* at 841 (Kennedy, J., concurring).

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Unique in the Constitution, the plain text of the Elections Clause serves "two functions. Upon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Inter Tribal Council*, 133 S. Ct. at 2253; 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 62 (Jonathan Elliot ed., 1836) [hereinafter "*Elliot's Debates*"] ("[I]n the first part of the clause, th[e] power over elections is given to the states, and in the latter part the same power is given to Congress."); *id.* at 68 (explaining that the Elections Clause "enables Congress to alter such regulations as the states shall have made with respect to elections").

The Framers gave Congress the express power to "make or alter" state election law because they were concerned that states would use their power to regulate the time, place, and manner of federal elections to deny or abridge the right of "We the People" to freely select federal representatives of their choice. "The dominant purpose of the Elections Clause, the

historical record bears out, was to empower Congress to override state election rules," *Ariz. State Legislature*, 135 S. Ct. at 2672, a reflection of "the Framers' distrust of the States regarding elections," *U.S. Term Limits*, 514 U.S. at 811 n.21. In federal elections, in which "[voters] act in a federal capacity and exercise a federal right," *id.* at 842 (Kennedy, J., concurring), "Congress was given the whip hand." *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995). In the Framers' judgment, the Elections Clause was a necessary "safeguard against state abuse," *U.S. Term Limits*, 514 U.S. at 808, designed to ensure that federal representatives in Congress would, in fact, be freely and fairly "chosen . . . by the people of the several states," U.S. Const. art. I, § 2, cl. 1. As one Framer explained, in case "the State governments *may* abuse their power, and regulate these elections in such manner as would be highly inconvenient to the people," the Elections Clause gave Congress the express "*constitutional* power of correcting them." Letter from Timothy Pickering, Delegate, Pa. Ratifying Convention, to Charles Tillinghast (Dec. 24, 1787), *quoted in* Charles W. Upham, 2 *The Life of Timothy Pickering* 357 (1873) (emphasis in original).

By its very nature, when Congress acts pursuant to the Elections Clause, it expressly supersedes state law. As this Court recently explained, "when Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Inter Tribal Council*, 133 S. Ct. at 2257. This preemptive force has been recognized by this Court for more than a century. *See Ex Parte Siebold*, 100 U.S. 371, 384 (1879) ("[T]he power of Congress over the subject [of federal elections] is paramount. . . . When exercised, the action of

Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or *alter*.'" (emphasis in original)); *Smiley*, 285 U.S. at 366-67 ("Congress may supplement . . . state regulations or may substitute its own. It may impose additional penalties . . . or provide independent sanctions. It 'has a general supervisory power over the whole subject.'" (quoting *Siebold*, 100 U.S. at 387)). In sum, "the power the Elections Clause confers is none other than the power to pre-empt." *Inter Tribal Council*, 133 S. Ct. at 2257.

At the Founding, the breadth of Congress's express power to "make or alter" state regulation of federal elections was understood by supporters and detractors alike. The plain text of the Elections Clause, as James Madison explained at the Constitutional Convention, uses "words of great latitude," recognizing that "[i]t was impossible to foresee all the abuses that might be made of the [states'] discretionary power." 2 *Records of the Federal Convention*, *supra*, at 240. As Madison explained, "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures[] and might materially affect the appointments." *Id.* at 240-41. Thus, the Framers' understanding was that Congress would have final say over questions of balloting, location of polling places, districting, and other of "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at

366. That includes voter registration, as this Court has held. *See Inter Tribal Council*, 133 S. Ct. at 2253.

Opponents of the Elections Clause, too, understood that the Clause gave Congress sweeping power to regulate the time, place, and manner of federal elections, explaining that their "great difficulty" was that "the power given by the 4th section was unlimited," 2 *Elliot's Debates* at 25, and "admits of the most dangerous latitude," 3 *id.* at 175; 4 *id.* at 55 ("[T]hey are words of very great extent. This clause provides that a Congress may at any time alter such regulations, except as to the places of choosing senators.").

In the ensuing debates over ratification of the Constitution, the Elections Clause was vigorously challenged. Anti-federalists argued that the Elections Clause "strike[s] at the state legislatures, and . . . take[s] away that power of elections which reason dictates they ought to have among themselves." 4 *id.* at 51. In their view, "Congress ought not to have the power to control elections." 2 *id.* at 23. Pressed to persuade their fellow Americans that the Elections Clause should be included in the Constitution, the Constitution's supporters justified this power as necessary to protect voting rights in federal elections from state infringement and to promote appropriate uniformity in election administration. These arguments carried the day, establishing the constitutional framework for federal regulation of federal elections that still governs more than two centuries later.

B. The Elections Clause Was Written To Give Congress Power To Protect Voting Rights from State Infringement and Establish Uniform Rules in Federal Elections.

The text and history of the Elections Clause demonstrate that it gives Congress "final say," *Foster*, 522 U.S. at 72, over the broad mechanics of federal elections, rejecting the "idea of state interference with the most basic relation between the National government and its citizens, the selection of legislative representatives." *U.S. Term Limits,* 514 U.S. at 842 (Kennedy, J., concurring). The Elections Clause was designed to empower Congress to "intervene against acts of injustice within the states," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 224 (1996), and to establish uniform rules that fulfilled the Constitution's promise of popular sovereignty by "We the People," *The Federalist No. 57*, at 319 (Madison) (Clinton Rossiter ed., rev. ed. 1999) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.").

During the debates over the Elections Clause at the Constitutional Convention, James Madison explained that the grant of power to Congress to override state regulation of the time, place, and manner of federal elections was necessary because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 *Records of the Federal Convention, supra*, at 240. Madison explained that "the Leg-

islatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections." *Id.* To prevent abuses by the states, it was necessary to give "a controuling power to the Natl. legislature." *Id.* at 241.

Madison was particularly concerned that states would use their power to regulate elections to skew the outcomes of federal elections. "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." *Id.* Along similar lines, Gouverneur Morris observed that "the States might make false returns and then make no provisions for new elections." *Id.*; *see The Federalist No. 59*, at 331 (Hamilton) (arguing that, without the Elections Clause, states "could at any moment annihilate [the Union] by neglecting to provide for the choice of persons to administer its affairs"). The Elections Clause was the "Framers' insurance against th[is] possibility." *Inter Tribal Council*, 133 S. Ct. at 2253. By the close of debate, the Convention's overwhelming consensus was that the Constitution should "give the Natl. legislature a power not only to alter the provisions of the States, but [also] to make regulations in case the States should fail or refuse altogether." 2 *Records of the Federal Convention*, *supra*, at 242.

In the ratification debates over the Constitution, the Constitution's supporters justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people's right to equal voting power." Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, at 210 (2010). For example, in the Virginia ratifying convention, James Madison stressed that Congress ought to have a role in securing equal voting rights.

"Some states might regulate the elections on principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 *Elliot's Debates* at 367. Others worried that states would simply not hold elections for federal office, preventing the popular vote demanded by the Constitution. *Id.* at 10 ("If the state legislature . . . would not appoint a place for holding elections, there might be no election . . . ."). These abuses "could only be guarded against by giving this discretionary power to Congress, of altering the time, place, and manner of holding the elections." *Id.*

Likewise, in the Massachusetts Convention, Theophilus Parsons argued that the Elections Clause was necessary to "secur[e] to the people their equal rights of election," 2 *id.* at 26, observing that the grant of power to Congress provided a check against partisan manipulation of the electoral process. "[W]hen faction and party spirit run high," Parsons worried, states might "introduce such regulations as would render the rights of people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors." *Id.* at 27. "Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature . . . who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.*; *see id.* at 25-26 (arguing that the Elections Clause was "as highly prized as any [section] in the Constitution" because "the *right* of electing persons to represent the *people* in the federal

government" is "an important and sacred right" (emphasis in original)); *id.* at 51 (arguing that, because of inequality of representation in South Carolina, "representatives . . . from that state, will not be chosen *by the people*, but will be the representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?").[2]

Madison and others also stressed the importance of establishing uniform ground rules in federal elections. At the Virginia ratifying convention, Madison argued that "the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent." 3 *id.* at 367. In other states, too, the Constitution's supporters argued that such regulations "ought to be uniform, and the elections held on the same day throughout the United States, to prevent corruption or undue influence." 2 *id.* at 535; *see* 4 *id.* at 60 ("Uniformity in matters of election is also of the greatest consequence. They ought all to be judged by the same law and the same principles, and not to be different in one state from

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[2] Similar arguments in favor of federal power over federal elections were made in other state conventions as well. *See* 2 *Elliot's Debates* at 441 (arguing that, in the event a state legislature should order a state-wide election to be held in one city, "ought not the general government to have the power to alter such improper election of one of its own constituents parts?"); 4 *id.* at 53-54 (recognizing need for an "ultimate power in Congress" in case "a few powerful states should combine and make regulations concerning elections which might deprive many of the electors of a fair exercise of their rights"); *id.* at 303 ("Congress should have this superintending power, lest, by the intrigues of a ruling faction . . . , the members of the House of Representatives should not really represent the people of the state . . . .").

what they are in another. . . . [I]t will be more convenient to have the manner uniform in all the states."); Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *supra*, at 357 ("[I]f any particular State government should be refractory and . . . either make no such regulations or improper ones, then the Congress will have power to make such regulations as will ensure to the *people* their rights of election and establish a *uniformity in the mode of constituting the members of the Senate and House of Representatives.*" (emphasis in original)).

Thus, throughout the ratifying debates, supporters of the Constitution made the case that Congress should have authority to "make or alter" state regulation of the time, place, and manner of federal elections in order to prevent state abuses. Far from infringing on state sovereignty in any way, the text properly gave Congress a "superintending power," 4 *Elliot's Debates* at 303, to alter state rules that threatened to undercut equal voting rights and the federal interest in a uniform system of federal elections.

In the First Congress, the Framers reaffirmed the need for broad federal veto power over state regulation of the time, place, and manner of federal elections. The Framers rejected a proposed amendment to the Elections Clause, which would have permitted Congress to regulate the time, place, and manner of federal elections only when a "State shall refuse or neglect, or be unable . . . to make such election." 1 Annals of Cong. 797 (1789) (Joseph Gales ed., 1790). In the debates over that proposal, Madison argued that "the constitution stands very well as it is" and that the proposed amendment would "tend to destroy the principles and efficacy of the constitution." *Id.* at 798, 800. The Elections Clause was "one of the most

justifiable of all the powers of Congress; it was essential to a body representing the whole community, that they should have power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations . . . ." *Id.* at 797.

This Court has repeatedly confirmed what the Constitution's text and history make clear: the Constitution provides for broad congressional power to regulate the time, place, and manner of federal elections in order to "override state election rules," and "act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672; *Inter Tribal Council*, 133 S. Ct. at 2253-54; *U.S. Term Limits*, 514 U.S. at 808-09; *see Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004) (plurality opinion).

II. THE NATIONAL VOTER REGISTRATION ACT'S BAN ON PURGING INACTIVE VOTERS FALLS SQUARELY WITHIN CONGRESS'S EXPRESS POWER TO ALTER STATE REGULATION OF THE TIME, PLACE, AND MANNER OF FEDERAL ELECTIONS.

In enacting the NVRA, Congress used its express constitutional authority to "make or alter" state regulation of federal elections, preempting voter purge laws that seek to strip the right to vote from qualified, registered voters "by reason of the person's failure to vote," 52 U.S.C. § 20507(b)(2), a prohibition that was maintained in the Help America Vote Act (HAVA), *id.* § 21145(a)(4) (providing that HAVA does not "supersede, restrict, or limit the application" of the NVRA). Thus, while Congress required states to

"conduct a general program that makes a reasonable effort to remove names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in residence of the registrant," *id.* § 20507(a)(4)(A), (B), Congress made clear that voters should not be removed because they failed to exercise the fundamental right to vote. As the statute makes explicit, a state's purge of voters "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote . . . ." *Id.* § 20507(b)(2). In other words, Congress determined that states may not strip citizens of the right to vote—a right "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—because of their failure to cast a ballot. In doing so, Congress ensured that "once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. 103-6, at 19; *see* Resp'ts Br. at 24-51 (explaining why Ohio's reading of the NVRA is wrong). Ohio, however, contends that the Act, as so read, "would exacerbate constitutional concerns with the NVRA," and would result in an "aggressive encroachment on the States' power" to establish voter qualifications. Pet'r Br. at 46, 50. Insisting that the Elections Clause only serves a "narrow purpose," *id.* at 49, Ohio claims that the NVRA must be read narrowly to comport with "basic federalism principles," *id.* at 57. This is wrong.

Ohio's argument turns a blind eye to the text of the Elections Clause, whose "substantive scope is broad," and plainly includes "regulations relating to 'registration'," *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley*, 285 U.S. at 366), as well as its history, which reflects the Framers' judgment that "it was essential to a body representing the whole communi-

ty, that they should have the power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations . . . ." 1 Annals of Cong. 797 (1789). That is why the Framers rejected proposed amendments that would have stripped out from the Elections Clause the power to "alter" state time, place, and manner regulation of federal elections. Ohio simply cannot come to grips with the veto power the Framers gave to Congress.

For good reason, this Court has held that the "power of Congress . . . 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'" *Inter Tribal Council*, 133 S. Ct. at 2253-54 (quoting *Siebold*, 100 U.S. at 392). Far from being limited in purpose, the Elections Clause gives Congress a sweeping power to "secur[e] to the people their equal rights of election," 2 *Elliot's Debates* at 26, in choosing federal representatives, a context in which voters "act in a federal capacity and exercise a federal right," *U.S. Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring). Congress sought to protect this federal right in the NVRA, preventing states from disenfranchising registered voters for failing to exercise their right to vote.

Ohio's contention that the NVRA's limits on purging inactive voters infringes on the power of states to set voter qualifications also falls wide of the mark. Section 20507(b)(2)'s prohibition against purging voters "by reason of the person's failure to vote" forbids a state from stripping the right to vote from registered voters—voters who, by definition, have fulfilled all of the state's voter qualifications. The NVRA's limitation on state voter purges falls squarely within Con-

gress's broad power to regulate the manner of holding federal elections—authority that empowers Congress "'to provide a complete code for congressional elections,'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley*, 285 U.S. at 366)—and leaves the setting of voter qualifications to the states.[3]

Ohio's argument fares no better when framed as a clear-statement rule "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014); Pet'r Br. at 54-57. When it comes to the regulation of the time, place, and manner of federal elections—which includes rules regarding registration—the Constitution gives Congress, not the states, the last word. Indeed, for this reason, this Court in *Inter Tribal Council* flatly rejected use of a clear-statement rule limiting Congress's preemptive powers under the Elections Clause. Because the "power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Inter Tribal Council*, 133 S. Ct. at 2257. Hence, "there is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Id.* No clear statement rule applies here.

In sum, the arguments offered by Ohio to make an end-run around the NVRA's prohibition on purg-

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[3] Ohio also suggests that the NVRA exceeds the powers of Congress as applied to presidential elections. Pet'r Br. at 53. But Ohio's claim that Congress lacks the power to regulate presidential elections has been repeatedly rejected by this Court. *See Ex Parte Yarbrough*, 110 U.S. 651, 657-58 (1884); *Burroughs v. United States*, 290 U.S. 534, 544-45 (1934); *Buckley v. Valeo*, 424 U.S. 1, 90 (1976).

ing qualified voters "by reason of the person's failure to vote," 52 U.S.C. § 20507(b)(2), are manifestly inconsistent with both the statute and the Elections Clause. The Elections Clause gives Congress the last word on the mechanics of federal elections, and thus "requires that [Ohio's] rule give way." *Inter Tribal Council*, 133 S. Ct. at 2257.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CURRENT AND FORMER OHIO ELECTIONS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Ohio Secretary of State,
Directive 2017-03 (Feb. 10, 2017). 9

Ohio Secretary of State,
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Ohio Secretary of State,
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https://www.sos.state.oh.us/globalassets/elections/forms/10-s-2.pdf. 9

Ohio Secretary of State,
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Other Authorities

Press Release, Ohio Secretary of State,
Secretary Husted: One Vote Can Make A Difference (Dec. 16 2016), https://www.sos.state.oh.us/media-center/press-releases/2016/2016-12-16/#gref. 12

U.S. EAC, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report*, https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf. 11

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U.S. EAC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012*, https://www.eac.gov/assets/1/28/EAC_NVRA%20Report_lowres.pdf. 11

US Elections Project & Nonprofit VOTE, *America Goes to the Polls 2016*, http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf. 9

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are current and former elections officials from various counties across the State of Ohio.[2] Their goal as elections officials is to ensure that their county's voter registration list is as up-to-date and accurate as possible, and that every eligible voter has the opportunity to cast her vote. They submit this brief to highlight the ways in which the Supplemental Process adopted by Ohio's Secretary of State thwarts these goals. The Supplemental Process is incompatible with Ohio's election scheme and ultimately results in the disenfranchisement of thousands of eligible Ohio voters.

A list of the 36 individuals participating as *amici* appears in an appendix to this brief.

SUMMARY OF ARGUMENT

Amici, current and former Ohio elections officials, seek to ensure that Ohio's voter rolls are as up-to-date and accurate as possible. Ohio's Supplemental Process is antithetical to that goal. It results in the elimination of voters from the rolls who are, in fact, eligible to vote. And it targets for elimination from the rolls those people who simply choose not to vote.

The National Voter Registration Act (NVRA) authorizes elections officials to update the rolls when voters move. But the statute expressly forbids elections officials

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel, made any monetary contribution to its preparation or submission. All parties in this case have filed letters with the Clerk granting blanket consent to the filing of *amicus curiae* briefs.

[2] *Amici* join this brief in their individual capacities, not on behalf of their respective county boards of election.

from removing voters for not voting. As the statute contemplates, the failure to cast a vote in every election should not disqualify a voter. *See* 52 U.S.C. § 20507(b)(2) (prohibiting "[a]ny State program or activity" that "result[s] in the removal ... of any person from the official list of voters registered to vote ... by reason of the person's failure to vote").

Paying little heed to this restriction, Ohio's Supplemental Process purges registered voters who are still eligible to vote. It eliminates both people who have never moved and those who have moved within the State (or even within their county). Yet Ohio law ensures that voters who move within the State remain eligible to vote. Ignoring this critical component of Ohio law, the petitioner eliminates them from the rolls even though they can still lawfully appear at their polling place and cast a ballot under Ohio's portable voter-registration system. These voters have the right to choose when to vote, and to choose not to vote, without jeopardizing their eligibility.

Ohio elections officials implement other mechanisms that do in fact protect against ineligible voters staying on the rolls, while at the same time ensuring that eligible voters remain registered. And, if the State wanted to further increase the accuracy of the voting rolls, there are other more targeted measures that could be adopted without disenfranchising duly registered Ohioans. By contrast, abstaining from casting a ballot has nothing to do with an Ohio voter's eligibility to vote. This Court should respect Congress's decision to forbid Ohio from purging infrequent voters and affirm the decision below.

ARGUMENT

I. The Secretary of State's Supplemental Process improperly presumes that voters who do not vote are ineligible.

A. The touchstone of the National Voter Registration Act's list-maintenance process is the voter's eligibility to vote. The NVRA authorizes the States to adopt a program "to remove ... *ineligible voters*" from the rolls by reason of "a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4) (emphasis added). "[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is *eligible to vote* in that jurisdiction." S. Rep. No. 103-6, at 19 (1993) (emphasis added).

Congress appreciated that a failure to vote does not indicate ineligibility to vote when it forbade States from purging voters because of "the person's failure to vote." 52 U.S.C. § 20507(b)(2). After all, recent experience shows that voting turnout even for presidential elections remains low across the country, and that percentage dips even further for mid-term elections. *See infra* at 5. If consistent voting were a requirement for maintaining eligibility, a large percentage of the country would face disenfranchisement.

Ohio's Secretary of State, however, sees infrequent voting as an opportunity to thin the voting rolls: if a voter does not vote, then she is presumed to be ineligible. The Supplemental Process is triggered solely by the voter's failure to vote for approximately two years. Through the purge system embodied in the Supplemental Process, Ohio purges voters who have not recently voted unless they respond to a confirmation notice or vote within the next four years.

But people neglect to respond to the confirmation notice for myriad reasons. Because most mail nowadays is either junk mail or bills, people may discard anything that does not look like a bill without reading it. The Supplemental Process should not exploit a common lack of attentiveness to mailed notices.

Moreover, Ohio's purge system is built upon a series of false premises. People may not respond to a confirmation notice if they have moved within the State—but in Ohio, moving within the State does not render one ineligible. The Supplemental Process treats not voting as a proxy for moving and assumes that moving renders the voter ineligible. As the petitioner states, the Supplemental Process "seeks to identify electors whose lack of voter activity indicates they may have moved, even though their names did not appear" in the change-of-address database. Pet. Br. at 10-11 (quoting *Brunner Directive 2009-05*). The petitioner thus takes for granted that a voter becomes ineligible to vote when she moves.

That does not reflect the reality of Ohio's voting framework. Under Ohio's portable voter-registration system, voters remain eligible to vote when they move within the State. And thus they should not be purged for moving to another county. According to the petitioner's own directives, ballots must be counted if the voter is registered anywhere in Ohio. Ohio Sec'y of State, *Provisional Voting: Directive 2015-28*, at 6-14–6-17 (Dec. 15, 2015), https://www.sos.state.oh.us/globalassets/elections/directives/2015/dir2015-28_eom-ch_06a.pdf.[3] Specifically, a voter who moves within the State may go to her new

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[3] *See also* Ohio Rev. Code § 3505.183(B)(3); Ohio Sec'y of State, *Ohio Election Official Manual*, at 6-14 (Aug. 8, 2017), https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-10_eom.pdf.

polling place and cast a provisional ballot. Provisional ballots cast in the correct polling place count as long as the person is registered to vote anywhere in the State.

In short, moving should only trigger removal from the rolls if a voter moves out of state because moving within the State does not render an Ohio voter ineligible to vote. The Supplemental Process, however, sets in motion a purge of these voters absent affirmative voter action.

B. While Ohio's Secretary of State wields voter inactivity as a proxy for ineligibility, there is a much simpler and more likely explanation: the voter has simply chosen not to vote, which is a right all eligible voters enjoy. Additionally, transportation difficulties, work schedules, health problems, family needs, domestic violence, voter intimidation, and other obstacles may impede one's ability to make it to the polls. As is widely reported, many eligible voters don't vote, even in relatively high turnout presidential elections. There are low voter turnout rates around the country, including in Ohio—for instance, four out of ten eligible voters stayed home in 2016, and six out of ten stayed home in 2014.[4]

Some groups vote at even lower rates. Young people and citizens of Hispanic or Asian-American/Pacific Islander descent have voting rates five to twenty percentage points below those of black or white voters.[5] The quintessential example of low-turnout voters are young people aged 18-29, who voted at rates less than 50% in 2016 and less than 20% in 2014.[6] And because young

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[4] US Elections Project & Nonprofit VOTE, *America Goes to the Polls 2016*, 6, 9, http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf (last visited September 22, 2017).

[5] *See id.* at 15-17.

[6] US Elections Project, *Voter Turnout Demographics*, http://www.electproject.org/home/voter-turnout/demographics (last

people may move more frequently than other voters, they are less likely to receive a confirmation notice (which is sent to an old address). Yet, if they've only moved within the State, they remain eligible to vote. Thus, under Ohio's Supplemental Process, young people are especially vulnerable to elimination from the rolls.

The pervasive impact of systematically disenfranchising youth and other historically low-turnout groups can be readily imagined. Congress wisely prohibited the States from using failure to vote as grounds for eliminating voters from the rolls. But the Supplemental Process does just that.

II. Ohio's Supplemental Process disenfranchises thousands of eligible Ohio voters.

A. The effects on the administration of Ohio's elections—not to mention the potential effects on election outcomes—are not merely hypothetical. In the November 2016 election, at least 7,515 eligible Ohio voters came to the polls at the precinct where they had registered but were forced to vote provisionally simply because they fell victim to the petitioner's purge efforts. These voters came to the polls rightfully expecting that they remained eligible and registered to vote. Yet they had been purged merely because it had been several years since they had last chosen to vote. The Court in this case ordered Ohio to count the ballots of those 7,515 eligible Ohio voters. *See* Pet. App. at 94a-100a; Pet. Br. at 14. But without that court order, these 7,515 people would have been disenfranchised.

As elections officials, we also know that this number vastly underestimates the number of voters wrongfully purged, as it only accounts for the limited subset who

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visited September 22, 2017).

showed up to the polls in the last election in the same precinct where they were registered, and tried to cast a ballot in person. We observe individuals who become frustrated, embarrassed, or confused based on questions about their eligibility and simply walk away from the polls. Nor does it account for the lengthier lines occasioned by poll workers trying to sort out these matters or the back-up caused by purged voters having to cast provisional ballots—those lines may dissuade others from voting.

Indeed, these 7,515 voters are only the tip of the iceberg. According to the U.S. Election Assistance Commission Election Day Survey, in the 2015-2016 period, Ohio purged 426,781 voters who failed to respond to the confirmation notice for voter inactivity.[7] From 2011-2014, Ohio purged 846,391 voters for the same reason.[8] Ohio also purged 384,451 voters in the 2015-2016 period and 480,957 Ohio voters in the 2011-2014 period for moving—even though, as discussed above, Ohio voters remain eligible to cast a provisional ballot so long as they move within the State of Ohio.[9]

Many of these voters remain eligible to vote and should be entitled to show up and exercise that right

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[7] U.S. EAC, *The Election Administration and Voting Survey, 2016 Comprehensive Report*, 98, https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf (last visited September 22, 2017).

[8] U.S. EAC, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report*, 106, https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf (last visited September 22, 2017); *see also* U.S. EAC, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012*, 67, https://www.eac.gov/assets/1/28/EAC_NVRA%20Report_lowres.pdf (last visited September 22, 2017).

[9] U.S. EAC, *2016 Comprehensive Report*, at 98.

when they choose to do so. For all the Secretary of State's platitudes about ensuring eligibility, the true effects of the Supplemental Process are impossible to mask.

The Supplemental Process disenfranchises voters in other ways as well. Voters purged from the rolls become ineligible to sign ballot initiatives or candidate petitions. Ohio Rev. Code §§ 3501.38, 3519.10. Their signatures on ballot initiatives do not count (often unbeknownst to the person signing and the group seeking the signature), thereby jeopardizing the ballot initiative or the eligibility of candidates relying on these signatures. In addition, the Secretary of State sends applications for absentee ballots to registered voters but omits individuals who haven't voted in the past four years. *See*, e.g., Ohio Sec'y of State, *Directive 2016-18*, at 1 (July 8, 2016), https://www.sos.state.oh.us/globalassets/elections/directives/2016/dir2016-18.pdf.

It does not take too much imagination to appreciate the impact of even the elimination of 7,500 votes. As the Secretary of State notes on his website, 112 Ohio elections have been decided by a single vote or were tied in approximately the past three years. *See* Press Release, Ohio Sec'y of State, Secretary Husted: One Vote Can Make A Difference (Dec. 16 2016), https://www.sos.state.oh.us/media-center/press-releases/2016/2016-12-16/#gref. And recent national elections have turned on the results in just a handful of States, with some States having razor-thin margins (think Florida in 2000). Eliminating these seven thousand votes (not to mention the many more purged in Ohio) has the potential to turn the tide in a national election, independent of its ramifications on state and local contests.

B. If the petitioner's true goal is ensuring accuracy and eligibility, better alternative mechanisms exist for

keeping the rolls as up-to-date and accurate as possible. Ohio already has in place far-reaching processes for maintaining up-to-date and accurate voter rolls without the Supplemental Process.

Beyond the Supplemental Process, Ohio has another mechanism for updating its rolls: the National Change-of-Address (NCOA) Process. The NCOA Process is triggered when a voter record in the United States Postal Service database indicates that the voter likely has moved. Ohio Rev. Code § 3503.21(B)(1); Ohio Sec'y of State, *Directive 2015-09* (May 19, 2015), https://www.sos.state.oh.us/globalassets/elections/directives/2015/dir2015-09.pdf

Ohio's NCOA Process itself sweeps broadly. When Ohio elections officials learn through the NCOA process that a voter has moved within her county, Ohio automatically updates the voter's registration with her new address and does not purge the voter simply because she has moved. Ohio Sec'y of State, *Directive 2017-03*, at 2–4 (Feb. 10, 2017), https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-03.pdf.[10] For voters moving to another Ohio county, however, the Secretary of State sends a confirmation notice with the voter's old address and asking the voter to confirm that old address or provide a new address—even though the State was just notified of the voter's new address.[11] If the out-of-county voter does not respond to the confirmation notice sent to her old address, or vote in four years, she is removed from the rolls. *Id.* at 7. (As is appropriate, those

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[10] *See also* Ohio Sec'y of State, *In County Confirmation Notice*, https://www.sos.state.oh.us/globalassets/elections/forms/10-s-2.pdf (last visited September 22, 2017).

[11] *See also* Ohio Sec'y of State, *Confirmation Notice*, https://www.sos.state.oh.us/globalassets/elections/forms/10-s-1.pdf (last visited September 22, 2017).

voters that have changed their address with the Post Office to an out-of-state address, or have not provided any forwarding address, are also purged if they are inactive and do no confirm their address.) The Secretary of State could better maintain the voter rolls by simply updating the addresses for voters moving to another Ohio county, just like he does for intracounty moves. As noted above, just like voters who move within a county, voters who move within the State are still eligible to vote. So if the Secretary of State learns from the NCOA process that a voter has moved within the State, he could update that person's registration in the voter rolls too.

Amici, with a front-row view of the inner-workings of election procedures in Ohio, have followed other state mandates to ensure that every eligible voter has the chance to cast a vote. For example, local elections officials remove voters from the rolls based on reports of deaths from county health departments and reports on felony convictions from county courts and the Department of Rehabilitation and Corrections. They receive data from these and other governmental agencies and compare it to their voting rolls.

In addition, the Secretary of State's office collects and uses change of address information from government agencies to update voter addresses. In accordance with the NVRA, the Ohio Bureau of Motor Vehicles (BMV) sends the petitioner all records of those who update their address with the BMV unless those individuals explicitly indicate that they do not want that information to be transferred. *See* 52 U.S.C. §§ 20504(d), 20507(f). The NVRA similarly requires state public assistance and disability agencies to distribute a voter-registration form "with each ... change of address form," 52 U.S.C. § 20506(a)(6)(A). As with BMV records, the State could automatically update the voter registration of any person who changes her address with public assistance,

veterans' services, and disability agencies. Adopting such measures would further ensure that the rolls are up-to-date and accurate.

The Secretary of State could also use the online voter registration system to improve the completeness and accuracy of the rolls. The online system requires registrants to use an Ohio driver's license or state ID and their social security number. If the voter's address on her ID does not match the current address she seeks to use for voter registration, she is told she cannot use the online system. The petitioner could instead redirect these voters to the BMV website with instructions to update their address. This kind of guidance would result in a more complete and accurate voter roll without eliminating voters based on their failure to vote.

These are but a few examples of ways that the petitioner could improve the accuracy of the voting rolls if he shares our goal of ensuring that Ohio's voter rolls are current and accurate. But instead of adopting these means to keep the rolls most current, he has pursued a process that eliminates duly registered voters, including voters who have never moved, and those who have moved within state lines and remain eligible to cast a ballot under Ohio's laws. To protect the franchise, the NVRA allows States to adopt cancellation procedures that target only "ineligible" voters. But the Supplemental Process instead purges many *eligible* voters simply for failing to vote and undermines the integrity of our electoral system.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Amici curiae are current and former elections officials from various counties across the State of Ohio. Their affiliations are noted for identification purposes only.

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Janet Carson,
Geauga County Board of Elections Member

Doris Adams,
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Reba Borchers,
Knox County Board of Elections Member

Jocelyn Bucaro,
Butler County Board of Elections Deputy Director

Frank Cloud,
Butler County Board of Elections Chair

Judith Craig,
Fayette County Board of Elections Member

Brad Cromes,
Portage County Board of Elections Deputy Director (former)

Paul Duggan,
Williams County Board of Elections Chair

Glenda Enders,
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Caleb Faux,
Hamilton County Board of Elections Member

Anthony Giardini,
Lorain County Board of Elections Member

Adam Gilson,
Knox County Board of Elections Member

Bethe Goldenfield,
Warren County Chair and Board of Elections Member

Sarah Greathouse,
Montgomery County Board of Elections Member

Amy Grubbe,
Erie County Board of Elections Member (former)

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Delaware County Board of Elections Member

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RECORD AND BRIEFS

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case considers the steps that States may take to maintain accurate voter-registration lists under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). These laws bar States from removing "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote," but clarify that a State must remove a voter if the voter does not respond to a confirmation notice sent by the State and does not vote in the next two general federal elections. 52 U.S.C. §§20507(b)(2), 21083(a)(4)(A).

Since 1994, as part of its general list-maintenance program, Ohio has sent voters who lack voter activity over a two-year period the confirmation notice that the NVRA and HAVA both reference. If these voters do not respond to that notice and do not engage in any additional voter activity over the next four years (including two more federal elections), Ohio removes them from the list of registered voters and requires them to reregister if they otherwise remain eligible to vote. The Sixth Circuit held that this decades-old process violates §20507(b)(2) because Ohio uses a voter's failure to vote as the "trigger" for sending a confirmation notice to that voter.

The question presented is:

Does 52 U.S.C. §20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, EFELDF has consistently defended not only the Constitution's federalist structure, but also its limits on federal power. In the context of the integrity of the elections on which the Nation has based its

[1] *Amicus* EFELDF files this brief with the consent of all parties; petitioner's and respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to the preparation or submission of this brief.

political community, EFELDF has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Three plaintiffs – A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless, and Larry Harmon – (collectively, "Plaintiffs") sue Ohio's Secretary of State ("Ohio") to enjoin Ohio's "Supplemental Process" for voter-roll maintenance under the National Voter Registration Act, 52 U.S.C. §§20501-20511 ("NVRA"),[2] and the Help America Vote Act of 2002, 52 U.S.C. §§20901- 21145 ("HAVA").[3]

Constitutional Background

The Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. "'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to ... the constitutional and prudential limits to

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[2] PUB. L. NO. 103-31, 107 Stat. 77 (1993).

[3] PUB. L. NO. 107-252, 116 Stat. 1666 (2002).

the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Moreover, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Thus, appellate courts have the obligation to review not only their own jurisdiction, but also the jurisdiction of the lower courts and to dismiss litigation if jurisdiction is lacking. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine*, 527 U.S. 706, 728-29 (1999), applying equally to suits by a states' own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Significantly, states can waive immunity by consenting to be sued only in their own court systems, without consenting to suits in federal

court. *Florida Dep't of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981).

Legislative and Regulatory Background

In 1993, Congress enacted NVRA to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(b)(1) (1994); 52 U.S.C. §20501(b)(1), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3) (1994); 52 U.S.C. §20501(b)(3). In addition to making it easier to register to vote, NVRA also *required* "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" for reasons such as death or change of residence. PUB. L. NO. 103-31, §8(a)(4), 107 Stat. at 83.

In §8(b)(2), NVRA provided that such programs "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* §8(b)(2), 107 Stat. at 83. At the time it acted, Congress was aware that almost all states updated their voting rolls at least biannually, with one fifth canvassing all voters, most canvassing only nonvoters (*i.e.*, using "not voting as an indication that an individual might have moved"), and only a "handful" striking nonvoters from the rolls with no prior notice. H.R. REP. NO. 103-9, at 30 (1993).

NVRA included an optional safe harbor of using the Postal Service's change-of-address data to identify voters who moved, PUB. L. NO. 103-31, §8(c), 107 Stat. at 83-84, but allowed any mechanism that complied with NVRA's provisions. As relevant here, NVRA's primary restriction prohibited removing registrants

unless they both failed to respond to a notice confirming their address and did not vote for two federal election cycles after that notice. *Id.* §8(d)(1)(B), 107 Stat. at 84. As its brief indicates, Ohio was one of the majority of states that culled its lists only after notice, from before NVRA's enactment to the present. Ohio Br. at 5.

The Clinton-era Department of Justice ("DOJ") took the position that NVRA precluded removing a registrant based on the *trigger* of nonvoting, even if final removal required the failure to respond to notice (*i.e.*, the practice that Ohio uses here and that most states used at the time of NVRA's enactment). Fed'l Election Comm'n, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996*, at 5-22 & n.13 (Mar. 1998) ("*FEC Report*"). In enacting HAVA, Congress made two relevant clarifications with respect to this issue.

First, HAVA appended the emphasized "except" clause onto the end of §8(b)(2):

> (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--*
>
> *(A) has not either notified the applicable registrar (in person or in writing) or*

> *responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then*
>
> *(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. §20507(b)(2) (emphasis added); PUB. L. NO. 107-252, §903, 116 Stat. at 1728.

Second, HAVA added a new provision on voter-roll maintenance, which included the following proviso:

> The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

52 U.S.C. §21083(a)(4) (citations omitted); PUB. L. NO. 107-252, §303, 116 Stat. at 1709-10.

Factual Background

Amicus EFELDF adopts Ohio's statement of the facts, Ohio Br. at 2-11, but also summarizes here the jurisdictional facts as alleged by Plaintiffs. In several instances, an individual last voted in 2008, which

would have triggered notice for not voting after the 2010 election cycle and then removal after the 2014 election.

- ***Larry Harmon***. Mr. Harmon last voted in 2008, but votes in most presidential elections, Harmon Decl. ¶¶5-6 (ECF #39-6); he did not move and does not recall receiving a notice, *id.* ¶¶3, 10.
- ***Chad McCullough***. Mr. McCullough was 44 years old in 2016, but voted for the first – and apparently only – time in 2008, McCullough Decl. ¶¶2, 6 (ECF #39-7), presumably because he "usually only vote[s] when there is an issue or candidate on the ballot that [he] care[s] about," *id.* ¶7.
- ***Elizabeth Bonham***. An attorney for Plaintiffs, Ms. Bonham is an eligible and registered voter, Bonham Decl. ¶3 (ECF #39-4), and does not allege any injury from Ohio's Supplemental Process.
- ***Delores Freeman***. The President of APRI's Youngstown Chapter, Ms. Freeman does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on her chapter: the re-registration process "creates a burden on our Chapter because we provide food and water to our volunteers during these voter registration drives and may also provide them with a small stipend," and it "will reduce our ability to engage in voter education and other activities." Freeman Decl. ¶¶25-26 (ECF #39-3).
- ***Lisa Keil***. Ms. Keil voted in 2008, but did not try to vote again until 2015, when she learned that she had been removed from the rolls, Keil Decl.

¶¶10, 14 (ECF #39-8); Ms. Keil subsequently re-registered to vote in the 2016 primary, which she did, and plans to vote in the 2016 general election, *id.* ¶20.

- ***Angaletta Pickett***. Ms. Pickett voted in 2012, but not in 2014, and understands that she would have received a notice from her county registrar under Ohio's Supplemental Process, but she cannot locate that notice, causing her to worry that she might be removed, notwithstanding that she planned to vote in 2016. Pickett Decl. ¶¶11, 13, 15 (ECF #39-2).
- ***KaRon Waites, Jr.*** The President of APRI's Cleveland Chapter, Mr. Waites does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on his chapter: "The Chapter is increasing our voter-registration efforts, but it occurs at the expense of other get-out-the-vote efforts, such as voter education, as well as other Chapter activities more generally," Waites Decl. ¶16 (ECF #39-5); because the Chapter's "members are engaged and committed to assisting the community with voting, ... that work takes away from the Chapter's energy and ability to help at a food bank or do other non-voting work in the community," *id.*
- ***Andre Washington***. The President of APRI's state chapter ("Ohio APRI"), Mr. Washington does not allege any personal injury from Ohio's Supplemental Process, but instead describes its impact on his organization: Ohio APRI "has limited resources, the need to re-register infrequent voters and to expend resources on technology to assist in targeting those specific

> voters will prevent the Cleveland Chapter from conducting the amount of outreach with first-time voters and individuals who have never been registered as it would otherwise be able to do" Washington Decl. ¶29 (ECF #39-1). Further, although he does not allege that voting-related efforts impair non-voting efforts, he notes that "Ohio APRI's mission includes supporting charitable ventures, such as feeding the hungry and providing clothing to those in need, and voter engagement, including voter outreach, voter education, and voter registration," but that the "majority of APRI's resources are dedicated to its voter engagement work." *Id.* ¶13.

Although not pressed by the parties, these facts go to this Court's and the lower courts' Article III power to decide aspects of this litigation.

SUMMARY OF ARGUMENT

In recently holding the "presumption against preemption" inapplicable to Election Clause legislation and express-preemption statutes, the Court did not eliminate the clear-statement rule as a canon of statutory construction for Election Clause legislation and express-preemption statutes. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2256-57 (2013) ("*ITCA*"); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016). Indeed, *ITCA* itself relied on the Election Clause precedent of *Ex parte Siebold*, 100 U.S. 371 (1880), which includes the clear-statement requirement. This Court neither did nor should overturn interpretive canons *sub silentio*, and any such reversal would need to apply prospectively to

new legislation, not retroactively to legislation that Congress enacted under well-understood and long-established clear-statement principles (Section I).

Although this Court need evaluate only whether Ohio's Supplemental Process satisfies federal law as it currently exists – *i.e.*, NVRA as clarified by HAVA – *amicus* EFELDF analyzes both NVRA as enacted and NVRA as clarified by HAVA. NVRA's need for HAVA's clarification provides the legislative context for HAVA's enactment, which in turn helps resolve the question of congressional intent.

Under NVRA as informed by the clear-statement rule, the Sixth Circuit erred by reading "by reason of" out of §8(b)(2). Under this Court's precedents and the dictionary definition, that phrase means "because of," and Ohio's Supplemental Process – while initiated by non-voting in some instances – is never consummated on the basis of non-voting. Instead, removal from the rolls happens only when the registrant fails to respond to the notice (Section II.A.1).

Under HAVA's clarifications, Ohio's case is even stronger. The "except" clause added to §8(b)(2) makes clear that that paragraph's language is not open to the Sixth Circuit's (and Plaintiffs') interpretation because the "except" clause distinguishes the combination of non-responsiveness to notice and non-voting from non-voting alone. While HAVA's clarification of §8(b)(2) independently would suffice for Ohio to prevail, HAVA also added 52 U.S.C. §21083(a)(4). This second provision expressly distinguishes between "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections" on the one hand and "registrant[s]

... removed *solely* by reason of a failure to vote" on the other hand. 52 U.S.C. §21083(a)(4)(A) (emphasis added). HAVA's clarifications thus reinforce the distinction that Ohio seeks to draw, especially when viewed under a clear-statement rule (Section II.B).

Jurisdictionally, it is doubtful whether Plaintiffs have standing. With the possible exception of Mr. Harmon, the individual declarants lack an imminent injury under Article III (Section III.A.2), and the institutional plaintiffs cannot assert their voluntary expenditure of funds as an injury caused *by Ohio*: Article III does not contemplate such "self-inflicted injuries" (Section III.A.1). Similarly, no Plaintiff claims injury from inadequate notice after moving out of Ohio, so Plaintiffs cannot challenge that aspect of Ohio's notice (Section III.D). Plaintiffs' other notice-based claims are moot because Ohio cured them, which denies this case not only an ongoing controversy under Article III (Section III.B), but also an ongoing violation of federal law necessary to bypass Ohio's immunity from suit in federal court (Section III.C). Assuming *arguendo* that any of Plaintiffs' claims are justiciable, this Court should make clear that relief can issue only for justiciable claims (Section III.D).

ARGUMENT

I. THE CLEAR-STATEMENT RULE APPLIES, NOTWITHSTANDING *ITCA*'S REJECTION OF THE PRESUMPTION AGAINST PREEMPTION.

Until recently, the Court's preemption cases included two somewhat inconsistent or competing modes of analysis to determine the intent of Congress.

First, the analysis begins with the federal statute's plain text, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). But second, under *Santa Fe Elevator* and its progeny, the analysis would sometimes apply a presumption against preemption for legislation in areas of existing or traditional state concern. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In recently rejecting the presumption against preemption in both express-preemption cases generally and Election Clause cases specifically, this Court did not simultaneously – and *sub silentio* – reject the clear-statement rule as a mechanism for interpreting what a statute's plain text actually means.

As an initial matter, the clear-statement rule and the presumption against preemption are not now the same thing, *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006) (distinguishing between the two), although the latter appears to have grown out of the former. Thus, while the precedents on which *Santa Fe Elevator* relied both merely required that Congress act clearly, *Napier v. Atlantic Coast Line*, 272 U.S. 605, 611 (1926) ("intention of Congress to exclude States from exerting their police power must be clearly manifested"); *Allen-Bradley v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (same), the presumption had grown over the years into a canon of statutory construction that could displace other canons: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*,

555 U.S. 70, 77 (2008) (interior quotations omitted). Thus, whatever their common origins, the clear-statement rule and the presumption against preemption had parted ways in recent years.

By contrast, the Court's "clear statement rules ... are merely rules of statutory interpretation, to be relied upon only when the terms of a statute allow," as "rules for determining intent when legislation leaves intent subject to question." *U.S. v. Lopez*, 514 U.S. 549, 610-11 (1995). Moreover, clear-statement rules interact with other canons of construction, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-09 (1991) (rule against repeals by implication); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206-07 (1991) (*stare decisis*), rather than supplanting them.

Perhaps because of that potential to displace other canons of construction, "the Court's treatment of the presumption against pre-emption has not been uniform" and its "express pre-emption cases since [*Cipollone v. Liggett Grp.*, 505 U.S. 504 (1992)] have marked a retreat from reliance on it to distort the statutory text." *Altria Group*, 555 U.S. at 101 (Thomas, J., dissenting). In any event, the Court has apparently finally pulled the plug on the presumption against preemption in express-preemption cases:

> because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S.Ct. 1938, 1946 (2016) (interior quotations omitted). As part of that trend, *ITCA* rejected the presumption against preemption for legislation under the Election Clause, 133 S.Ct. at 2256-57, finding that "there is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Id.* at 2257. But that rejection begs the question whether the clear-statement rule applies, along with other canons of construction, to determine congressional intent if the legislation's plain text is unclear.

ITCA itself answers the question by citing *Siebold* as the basis for rejecting the presumption against preemption. *Id.* at 2256 (*quoting Ex parte Siebold*, 100 U.S. 371, 384 (1880)); *accord U.S. v. Bathgate*, 246 U.S. 220, 225 (1918). In both *Siebold* and *Bathgate*, this Court applied then-traditional preemption analysis, requiring a clear federal statement and presuming that Congress acted with deference to state laws. In *Siebold*, 100 U.S. at 393, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with state laws." Similarly, in *Bathgate*, 246 U.S. at 225-26, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting state authority over elections and "consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." Thus, for Election Clauses cases, this Court's clear-statement rule is congruent with the clear-statement rule on which *Santa Fe Elevator*

relied for Commerce Clause legislation that trenches on states' police power. All that *ITCA* rejected was using the modern presumption against preemption to distort legislative intent by picking a less-obvious but plausible statutory meaning to avoid ascribing an intent to Congress that was not clearly expressed.

Going the next step – *i.e.*, reversing this Court's historic clear-statement rule in Election Clause cases, *Siebold*, 100 U.S. at 393; *Bathgate*, 246 U.S. at 225-26 – would be improper, and nothing in *ITCA* requires that unsettling result. If this Court nonetheless seeks to change the way that it interprets Election Clause legislation, the Court should announce that change now, but apply the change prospectively to *new* legislation, as this Court has done in similar contexts. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979); *cf. Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"). Any other course would disrupt expectations and impose unintended restrictions on states' sovereignty.

II. OHIO'S SUPPLEMENTAL PROCESS COMPLIES WITH FEDERAL LAW.

There is no legitimate question that congressional intent – revealed through statutory text – *controls*: "Elections Clause legislation, 'so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.'" *ITCA*, 133 S.Ct. at 2256 (*quoting Siebold*, 100 U.S. at 384); *McPherson v. Blacker*, 146 U.S. 1, 40-41 (1892) ("[i]n this respect it is in conflict with the act of Congress, and must necessarily give

way"). Unfortunately, the parties and lower courts disagreed on what congressional intent *is* under NVRA, as clarified by HAVA. Accordingly, in addition to looking at the statutory text, this Court must look also to the statutes' structure and purposes in their context. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111-12 (1992). That analysis shows that NVRA and HAVA allow Ohio's Supplemental Process because deregistration flows from the failure to respond to Ohio's notice, not solely from nonvoting.

A. Ohio's Supplemental Process complies with NVRA.

Even before HAVA's clarification, NVRA did not preclude *most* states from continuing their pre-NVRA practice of deregistering voters after notice. The Sixth Circuit's contrary result flowed from reading §8(b)(2)'s "by reason of" language out of the statute. When that language is properly considered, the Sixth Circuit's reasoning – while wrong – becomes untenable.

1. Ohio's Supplemental Process does not purge voters "by reason of" non-voting.

As enacted in NVRA, §8(b)(2) prohibited removal "by reason of the person's failure to vote," albeit under the awkward phrasing that a state's voter-roll maintenance program "shall not result in the removal of [a] person ... by reason of the person's failure to vote" 42 U.S.C. §1973gg-6(b)(2) (1994); 52 U.S.C. §20507(b)(2). The Sixth Circuit adopted a flows-from definition of *"result"* and ignored *"by reason of"* altogether. As Ohio explains, the Sixth Circuit's choice of definitions for result is not the best choice here, Ohio Br. at 19-26, but the bigger problem is that

the by-reason-of qualifier imposes a degree of causation that the Sixth Circuit failed to consider. Specifically, a voter who is removed for failing to respond to a notice is not removed "by reason of" non-voting.

Of course, "unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S.Ct. 1886, 1893 (2013) (alterations and interior quotations omitted). Under the Court's precedents and dictionary definitions, the phrase "by reason of" means "because of." *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2527 (2013) ("the ordinary meaning of 'because of' is 'by reason of' or 'on account of'") (interior quotations omitted); *Burrage v. U.S.*, 134 S.Ct. 881, 889 (2014) ("the phrase, by reason of, requires at least a showing of 'but for' causation") (internal quotations omitted); AMERICAN HERITAGE DICTIONARY 1506 (3d ed. 1992) (defining 'by reason of' as 'because of'). Under §8(d)(1)(B), deregistration requires both failing to respond to a notice *and* nonvoting for two federal-election cycles. 42 U.S.C. §1973gg-6(d)(1)(B) (1994); 52 U.S.C. §20507(d)(1)(B). Nonvoting alone is never enough to cause deregistration.

2. The Clear-Statement Rule reinforces Ohio's compliance with NVRA.

Even if the statutory text as interpreted in the prior section and Ohio's brief were inconclusive, this Court should rely on the clear-statement rule to find Ohio's Supplemental Process compliant with NVRA. *See* Section I, *supra* (clear-statement rule applies to Election Clause legislation). In context, it appears that Congress was aware of the states' roll-

maintenance procedures and prohibited only the no-notice culling practiced by a small minority of states, rather than the notice-based culling required by NVRA (and practiced by a majority of states):

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contract all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). *Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under H.R. 2.*

H.R. REP. NO. 103-9, at 30 (emphasis added). The states that could not continue the practice per the report are clearly the pre-NVRA "handful" that struck registrants without notice, *id.*, particularly under clear-statement principles. *Siebold*, 100 U.S. at 393 ("presum[ing] that Congress has [exercised its authority] in a judicious manner" and "endeavored to guard as far as possible against any unnecessary interference with state laws"); *Bathgate*, 246 U.S. at 225-26 (Congress must "express[] a clear purpose to establish some further or definite regulation" before supplanting state authority over elections, given "the policy of Congress not to interfere with elections within a state except by clear and specific provisions").

B. HAVA's clarifications make the case for Ohio's compliance stronger.

In HAVA, responding to an aggressive DOJ interpretation of NVRA, *FEC Report*, at 5-22 & n.13, Congress revisited the issues raised by this litigation by enacting two provisions. First, §903 amended NVRA by adding the "except" clause to the end of §8(b)(2). PUB. L. NO. 107-252, §903, 116 Stat. at 1728. Second, §303 added a new section on the criteria for maintaining statewide voter registration, PUB. L. NO. 107-252, §303, 116 Stat. at 1708-14, which includes the proviso that "no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. §20507(a)(4) (emphasis added). As explained below, both clarifications reinforce Ohio's position, which provides "great weight" in interpreting NVRA as enacted. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ([s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). Thus, even if NVRA itself were unclear in 1993, the state of federal law in place today would nonetheless be crystal clear.

HAVA's "except" clause supplements §8(b)(2) to make clear that nothing in §8(b)(2) prohibits states' using NVRA roll-maintenance procedures that remove registrants that both fail to respond to state notice and do not vote in two post-notice federal elections. 52 U.S.C. §20507(b)(2). Particularly when combined with the provision that disallows removing registrants "*solely* by reason of a failure to vote," 52 U.S.C. §21083(a)(4) (emphasis added), HAVA makes the Sixth Circuit's and Plaintiffs' position untenable.

Both of the Sixth Circuit's two counterarguments are unavailing. First, the Sixth Circuit argues that the "except" clause warrants a narrow reading as an exception to a general rule under *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). The problem with this analysis is that Congress has not here "enacted a general rule" (*e.g.*, one "that treats boot as capital gain"), which the Court would "eviscerate ... through an expansive reading of a somewhat ambiguous exception." *Id.* To the contrary – notwithstanding the root word "except" – the "except" clause is not an exception at all. It is more of a proviso – and "except" could easily be replace by "provided" – that interprets the scope of the entire paragraph. If anyone doubted that interpretation, the "solely" clause in 52 U.S.C. §21083(a)(4) makes clear that Congress did not want registrants removed for non-voting alone, but allowed removing registrants for failing to respond to notice and then not voting for two federal elections.

The Sixth Circuit goes on to fault Ohio's position as rendering §8(b)(2)'s HAVA-added "except" clause as mere surplusage *vis-à-vis* the existing requirements of §8(d)(1). Given the then-extant dispute of whether §8(b)(2) allowed removal of non-voting registrants who failed to respond to notice, *FEC Report*, at 5-22 & n.13, it was not mere surplusage for Congress to answer that question. This Court has emphasized the need to read statutes in context to understand otherwise unclear text, *King v. Burwell*, 135 S.Ct. 2480, 2490 (2015), and the historical context here explains any repetition between NVRA's allowance for removal based on *both* unanswered notice *and* non-

voting *vis-à-vis* its prohibition of removal for non-voting alone (*i.e.*, without notice).

C. If Plaintiffs prevail, the remedy on remand should be limited to the areas where Plaintiffs prevailed.

Assuming *arguendo* that Ohio has violated some aspect of NVRA or HAVA, this Court should limit the remedy on remand in two jurisdictional ways. First, with respect to Article III jurisdiction, Plaintiffs can recover only on claims for which Plaintiffs state a case or controversy. *See* Section III.D, *infra*. But second, there is a merits-based jurisdictional element that goes to the jurisdiction of Congress under the Elections Clause:

> In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. *We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction*; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

Siebold, 100 U.S. at 393 (emphasis added). If Ohio on remand wants to split its voter rolls to deregister any

noncompliant registrants for *state* elections, Congress has no authority to regulate that choice. As this Court recognized in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008), courts should not invalidate entire statutes based on limited or minor instances of violations. If this Court remands with instructions for anything but dismissal for failure to state a claim, the remand should be confined to issues within not only the federal courts' jurisdiction but also the federal legislature's jurisdiction.

III. THIS COURT SHOULD ASSURE ITSELF OF ARTICLE III JURISDICTION.

Under *Steel Company*, this Court has the duty to police Article III's limits, even if the parties concede that jurisdiction is proper. 523 U.S. at 95. Regarding Ohio's immunity from suit in federal court, this Court may disregard the issue as long as Ohio does not raise it, but the Court must consider it if Ohio raises it at any time. While Mr. Harmon or some individual members potentially may have Article III standing, even that is doubtful for most, if not all, of the claims raised here.

A. The record does not establish that Plaintiffs *ever* had standing.

Before this Court can consider the merits, plaintiffs must establish their standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009). The lower courts never properly analyzed standing, and Plaintiffs appear to lack it for most, if not all, of their claims.

To establish standing, a plaintiff must show an "injury in fact," which consists of (1) an actual or imminent invasion of a constitutionally cognizable

interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).

Membership associations can sue on behalf of their members, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), but Article III requires specific names to ensure that the parties include an affected person, *FW/PBS*, 493 U.S. at 235, unless the injury applies to all members. *Summers*, 555 U.S. at 498-99 ("requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity") (emphasis in original). Here, the state's Supplemental Process does not affect each and every member of the institutional plaintiffs, so the jurisdictional analysis looks only to the identified members.

On top of the constitutional baseline, standing jurisprudence also recognizes prudential elements, such as a conditional bar against seeking to redress third parties' rights, *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004),[4] and a requirement that a claimed

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[4] Third-party standing requires the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own

injury in fact falls within the zone of interest of the statutory provision that the plaintiff seeks to enforce. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Here, it is not clear whether the institutional plaintiffs' asserted injuries fall within NVRA's and HAVA's zones of interest.

1. **The institutional plaintiffs suffer self-inflicted injuries.**

In addition to asserting their members' injuries,[5] the institutional plaintiffs also assert injury in their own right, claiming that Ohio's Supplemental Process compelled the institutional plaintiffs to divert resources from other good works to counteract the effect of Ohio's actions. Washington Decl. ¶¶13, 29; Freeman Decl. ¶¶25-26; Waites Decl. ¶16. Unless such injuries fall within the relevant statute's zone of interests, these injuries would be self-inflicted injuries not caused by the defendant's conduct. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). While the institutional plaintiffs potentially may assert claims within NVRA's zone of interests, it is nonetheless important for the Court to resolve that issue.

Too often, the lower courts rely on standing based on a diverted-resources rationale that the defendant's challenged action *caused* the plaintiff to divert efforts to counteract that action. If mere spending could

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rights. *Id.* As Mr. Harmon's participation demonstrates, nothing precludes rights holders from bringing suit.

[5] Where the institutional plaintiffs assert their members' injuries, those claims are addressed in Section III.A.2, *infra*.

manufacture standing, any private advocacy or welfare organization could establish standing against any government action.[6] But that clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). The disconnect appears to be an overbroad reliance on the diverted-resource rationale in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982), which concerned an unusual and specific statute in which Congress authorized suit by anyone, without regard to whether the person was "aggrieved" by the violation of the underlying statute.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens Realty* held that the Fair Housing Act at issue there extends "standing under § 812 ... to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and

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[6] *Compare, e.g., Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 n.10 (11th Cir. 1989) *with Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.). In *Haitian Refugee Center*, the Eleventh Circuit incorrectly applied the *Havens Realty* diversion-of-resources theory to private expenditures without analyzing whether those expenditures fell within the zone of interests of the Immigration and Nationality Act. 872 F.2d at 1561 n.10. By contrast, in applying *Havens Realty* to diverted resources in *Action Alliance* then-Judge Ginsburg correctly recognized the need to ask whether those diverted resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939.

typical statute lack several critical criteria from *Havens Realty*.

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right ... the alleged deprivation of [those rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens Realty*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, under a typical statute, there will be no rights even *remotely* related to a third-party organization's spending.

Third, and most critically, the statute in *Havens Realty* eliminated prudential standing, so the zone-of-interest test did not apply. When a plaintiff – whether individual or organizational – sues under a statute that does not eliminate prudential standing, that plaintiff cannot bypass the zone-of-interest test or other prudential limits on standing. Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Here, this Court might – or might not – find that NVRA sought to ease voter-registration burdens for groups

like the institutional plaintiffs here, but that is not uniformly true for all statutes or all institutional plaintiffs. It is important for any federal court to ask the prudential questions, if only to assure itself of its jurisdiction.

2. Mr. Harmon and the individual members lack injuries in fact.

Of Plaintiffs' eight declarants, only four – Keil, Harmon, McCullough, and Pickett – allege personal injury from Ohio's Supplemental Process.[7] For various reasons, the injuries alleged here may not qualify as sufficiently actual or imminent for Article III.

Without concrete particulars, future injury can be insufficient to establish standing: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Defenders of Wildlife*, 504 U.S. at 564. Relatedly, as indicated, claims are unripe if they "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300. Most, if not all, of the claimed injuries fail to show the immediacy that Article III requires.

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[7] Of the remaining four, one is registered to vote and appears to have submitted her declaration as evidence about Ohio's Supplemental Process rather than to demonstrate her own personal injuries, Bonham Decl. ¶3, and the others are APRI officers who do not allege personal injury but instead provide evidence of the impact of Ohio's Supplemental Process on their group. Washington Decl. ¶¶13, 29; Freeman Decl. ¶¶25-26; Waites Decl. ¶16.

Mr. McCullough is 45 but has only voted once, preferring to "only vote when there is an issue or candidate on the ballot that [he] care[s] about." McCullough Decl. ¶¶2, 6-7. Similarly, Ms. Keil is currently registered and voted in 2016, Keil Decl. ¶20, so she would not be removed until after she ignored a notice two years after not having voted in a federal election, and then did not vote in another two election cycles. Neither Mr. McCullough's wanting to vote in a future election nor Ms. Keil's being removed for not voting in six future elections are sufficiently imminent to constitute an Article III controversy.

Ms. Pickett's injury – while it might come to pass sooner than Ms. Keil's injury – is also not imminent. She voted in 2012, but not in 2014, and she cannot locate her notice, but in any event planned to vote in 2016. Pickett Decl. ¶¶11, 13, 15. Even if she did not vote in 2016, she would not be removed from the voter rolls unless she also both failed to vote in 2018 and failed to otherwise update her records with the registrar. While possible, that eventuality may not come to pass.

Finally, Mr. Harmon voted in 2008 but not in 2012, although he prefers to vote in most presidential elections. Harmon Decl. ¶¶5-6. Assuming that he did not re-register and vote in 2016, Mr. Harmon may have an ongoing injury from his 2015 removal that may prevent his otherwise-likely wish to vote in the 2020 presidential election.

B. Assuming *arguendo* that standing existed, the notice-based claims are moot.

With regard to the insufficient-notice claims, Ohio has cured all alleged issues but one (notice for out-of-state movers). Because the only defendant here is a state officer imbued with Ohio's immunity from suit in federal court and Congress has not abrogated that immunity for NVRA claims, the basis for jurisdiction here is not NVRA's private right of action, 52 U.S.C. §20510(b),[8] but rather the *Ex parte Young*, 209 U.S. 123 (1908), doctrine of suing a state officer to enjoin ongoing violations of federal law.

The *Young* officer-suit exception offers a limited exception to sovereign immunity, but only for *ongoing violations* of federal law. *Green v. Mansour*, 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of the NVRA notice issues, which – except for out-of-state movers – Ohio has cured. As such, those notice claims are now moot, and – relatedly – Ohio could claim that the action now lies outside the *Young* exception to Ohio's sovereign immunity. *See* Section III.C, *infra*.

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[8] NVRA does not displace any otherwise-applicable remedies, 52 U.S.C. §20510(d)(1), so *Young* remains applicable. The only significant upshot of proceeding under *Young* instead of NVRA's private right of action is that Plaintiffs would lack a right to an attorney-fee award if they prevail under *Young*, whereas NVRA provides a fee-shifting mechanism for prevailing parties. 52 U.S.C. §20510(c).

C. Ohio's sovereign immunity bars the notice claims.

Although Plaintiffs potentially could have sued the individual local registrars, they chose to sue a state officer, who enjoys immunity from suit under the Eleventh Amendment. While federal courts may ignore sovereign immunity until a state asserts it, *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998), states may raise it any time, even on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Moreover, unlike some states, *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975), Ohio does not authorize either state officers or their attorneys to waive Ohio's immunity.[9] Consequently, no "waiver" could be premised on Ohio's raising the defense for the first time at this stage.

D. The remedy must be limited to the Article III case or controversy.

Plaintiffs challenge several aspects of Ohio's voter registration procedures, including the Supplemental Process triggers and the adequacy of the notice forms. Regarding notice forms, Plaintiffs challenge the form on several grounds, all but one of which (concerning out-of-state movers) Ohio has cured. Neither Plaintiffs' allegations nor their evidence establish any out-of-state movers in their respective memberships, much less an individually identified member. Because "standing is not dispensed in gross," *Lewis v. Casey*,

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[9] *In re Pitts*, 241 B.R. 862, 878 (Bankr. N.D. Ohio 1999); *Taylor v. Perini*, 503 F.2d 899, 905-06 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1975); *Evans v. Cordray*, 2012 U.S. Dist. LEXIS 41238, at *14-15 (S.D. Ohio Mar. 26, 2012) (No. 2:09-cv-587).

518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006), plaintiffs must establish standing for each form of relief that they request. Nothing shows that Plaintiffs have any entitlement to relief for out-of-state movers. Similarly, as indicated above, it is not entirely clear that Plaintiffs have standing for any of their claims. Assuming *arguendo* that that Plaintiffs have standing for *some* relief, however, this Court has the duty to narrow that relief to the claims for which Plaintiffs state an Article III case or controversy.

CONCLUSION

For the foregoing reasons and those argued by Ohio, the Court should reverse the Sixth Circuit.

August 7, 2017

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RECORD AND BRIEF.

No. 16-980

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS AND LARRY HARMON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF FORMER ATTORNEYS OF THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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United States v. Pulaski County,
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America The Vulnerable: The Problem of Duplicate Voting, Government Accountability Institute (2017) 20

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 12

Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005) 15, 16

Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated July 2017) 19

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Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013) 19

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U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* (2009).....16, 21

IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are six former attorneys of the Civil Rights Division of the United States Department of Justice:

1. Colonel Karl S. "Butch" Bowers is the State Staff Judge Advocate for the Joint Force Headquarters, South Carolina Air National Guard, and a lawyer in private practice, focusing on governmental and legislative affairs, campaign finance and election law, and regulatory matters. In 2007-08, Col. Bowers was appointed by President George W. Bush as Special Counsel for Voting Matters at the U.S. Department of Justice. He also has served as the Staff Judge Advocate for the 169th Fighter Wing, as the Chairman of the South Carolina Election Commission, and as a JAG officer. Col. Bowers earned a J.D. from Tulane Law School, a M.P.A. from the College of Charleston, and a B.A. from the University of South Carolina.

2. Christopher Coates is the former General Counsel for the American Civil Rights Union. He worked in the Voting Section of the Justice Department from 1996-2010. During ten of those years, he worked in a supervisory or management position, and during two of those years he was the Chief of the Voting Section. He earned the Walter W. Barnett Memorial Award in 2007, the Civil Rights Division's second highest award for excellence in advocacy. From 1985-96, Mr. Coates was an attorney with

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

the Voting Rights Project of the American Civil Liberties Union. In 1991, he was awarded the Thurgood Marshall Decade Award by the Georgia NAACP for his work in voting rights and civil rights law. He is a graduate of the University of North Carolina at Chapel Hill and the University of North Carolina School of Law.

3. Christy McCormick has worked in voting and elections for over 25 years, starting out as an assistant voter registrar in Connecticut in 1988. She is currently a Commissioner on the Presidential Commission on Election Integrity. She is also a Commissioner on and former Chair of the U.S. Elections Assistance Commission (EAC). Prior to the EAC, she was a Senior Trial Attorney in the Voting Section of the Department of Justice's Civil Rights Division for eight years. During 2009-10, she was detailed by the Deputy Attorney General to the U.S. Embassy in Baghdad to work on the Iraq national elections and rule-of-law matters. Previously, she clerked for Justice Elizabeth A. McClanahan on the Court of Appeals of Virginia. She also served as an Assistant Solicitor and Assistant Attorney General in Virginia. Commissioner McCormick received a B.A. from the University of Buffalo and a J.D. with honors from the George Mason University (now Antonin Scalia) Law School. She also has attended the William & Mary School of Law.

4. Robert D. Popper has been practicing law for 26 years. He has special knowledge and expertise in the area of voting law. Along with Professor Daniel D. Polsby, he is the co-creator of the "Polsby-Popper" compactness standard, used to measure racial and partisan gerrymandering. In 1995, he represented plaintiffs in a successful constitutional challenge alleging racial segregation in

the design of New York's 12th Congressional District. In 2005, Mr. Popper joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, and in 2008, he was promoted to Deputy Chief. In 2013, he joined Judicial Watch as Director of the Election Integrity Project, in which capacity he litigates voting rights cases. Mr. Popper is a graduate of the University of Pennsylvania and Northwestern Law School.

5. Bradley J. Schlozman served as a Deputy Assistant Attorney General (and Acting Assistant Attorney General) of the Civil Rights Division from 2003-06, where his responsibilities included supervision of the Voting Section. He also later served as U.S. Attorney for the Western District of Missouri from 2006-07. Mr. Schlozman now practices law at the Hinkle Law Firm and frequently represents states and municipalities on a variety of voting rights matters.

6. Hans A. von Spakovsky is a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation, where he concentrates on voting, elections, campaign finance, civil rights, immigration enforcement, and government reform. In 2006-07, he served as a Commissioner of the Federal Election Commission. From 2002-05, he served as Counsel to the Assistant Attorney General for Civil Rights, providing expertise and advice on voting and election issues. The Commission on Federal Election Reform organized by President Jimmy Carter and Secretary James Baker also sought his expertise. Mr. von Spakovsky also has served as a member of the first Board of Advisers of the U.S. Election Assistance Commission, as Vice Chairman of the Fairfax County

Electoral Board in Virginia, as a member of the Fulton County Registration and Election Board in Georgia, and as a member of the Virginia Advisory Board to the U.S. Commission on Civil Rights. Mr. von Spakovsky currently is a Commissioner on the Presidential Commission on Election Integrity. He is a graduate of Vanderbilt University Law School and the Massachusetts Institute of Technology.

During their tenures, *amici* were charged with enforcing the nation's election laws, including the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). *Amici* have a continued interest in the proper interpretation and enforcement of these laws. The Sixth Circuit adopted an interpretation of the NVRA that contradicts how *amici* enforced that statute. In fact, during *amici*'s tenures, the Justice Department negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here. The Sixth Circuit's interpretation of the NVRA squarely contradicts this history of enforcement and threatens to undermine the core purposes of the NVRA—ensuring the accuracy of state voter rolls and protecting the integrity of federal elections.

SUMMARY OF ARGUMENT

Amici were once tasked with enforcing the NVRA, part of the "complex superstructure of federal regulation" that "Congress has erected ... atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). The NVRA requires the states to keep their voter rolls up to date. Each state must adopt a program that removes voters from the rolls when they

move to a different jurisdiction. Although a voter cannot be removed solely because he failed to vote, a voter can be removed if the state sends him a notice and he neither responds nor votes in two consecutive federal elections. There are no limits on when the states can send these notices or to whom they can send them; the NVRA says nothing about that.

Or at least that is how *amici* interpreted and enforced the NVRA when they served in the Civil Rights Division of the Justice Department. But the Sixth Circuit, in a 2-1 decision, rejected this settled interpretation. It struck down Ohio's Supplemental Process, which sends individuals an NVRA-compliant notice if they have not engaged in voter activity for two years. The Supplemental Process violates the NVRA, according to the Sixth Circuit, because the "trigger" for the notice is a person's failure to vote.

The Sixth Circuit erred, and its error warrants this Court's correction. The text, structure, and history of the NVRA all point in the same direction: the NVRA requires the states to send notices before removing voters for changing residences. But it does not regulate the "triggers" for those notices. In fact, *amici* helped the Justice Department negotiate settlements with localities in Pennsylvania, Indiana, and Arkansas that required a notice procedure indistinguishable from Ohio's Supplemental Process. The decision below directly contradicts this history of federal enforcement. And it deprives the states of an important tool in combatting bloated voter rolls. "[A]ccurate and current voter registration lists," in turn, "are essential to the integrity of the election process and for the protection

of the individual." H.R. Rep. No. 103-9, at 14 (1993); S. Rep. No. 103-6, at 31 (1993).

ARGUMENT

This Court should reverse the Sixth Circuit for two main reasons. First, the Sixth Circuit's interpretation of the NVRA conflicts with its text, structure, and history. *Amici* have long interpreted the statute oppositely, and they helped the Justice Department negotiate settlements that would be illegal under the Sixth Circuit's view. Second, the Sixth Circuit's decision deprives Ohio and other jurisdictions of an important means to combat bloated voter rolls, a real and pressing threat to the integrity of federal elections.

I. The Sixth Circuit's interpretation of the NVRA is incorrect and contradicts the Justice Department's longstanding enforcement policy.

A. The Sixth Circuit's interpretation of the NVRA conflicts with the law's text, structure, and history.

The NVRA has two main goals: maximizing the number of eligible citizens on the voter rolls and minimizing the number of ineligible citizens on the voter rolls. *See* 52 U.S.C. § 20501(b). To minimize the number of ineligible voters, the NVRA requires states to adopt a "program" that removes registered voters who become ineligible "by reason of ... a change in the[ir] residence." *Id.* § 20507(a)(4)(B).

The NVRA limits how states can remove these now-ineligible voters—two of those limits are relevant here. First, under subsection (b)(2), states cannot adopt a program that "result[s] in the removal of the name of any person ... by reason of the person's failure to vote." *Id.* § 20507(b)(2). Second, under subsection (d), states cannot remove voters without confirming that they actually have changed residences. *See id.* § 20507(d). A state can conclude that a voter changed residences, however, if he "fail[s] to respond to a notice" sent by the state and "has not voted or appeared to vote" in two consecutive federal elections. *Id.* § 20507(d)(1)(B).

At first blush, these limits may seem contradictory. Subsection (b)(2) prohibits states from removing voters "by reason of [their] failure to vote." *Id.* § 20507(b)(2). Yet subsection (d)'s notice procedure allows states to remove voters precisely because they failed to vote in consecutive federal elections. But the NVRA resolves this tension by clarifying that subsection (d)'s notice procedure does *not* "result in the removal of the name of any person ... by reason of the person's failure to vote" for purposes of subsection (b)(2):

> [A state program] shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except* that nothing in this paragraph *may be construed* to prohibit a State from using [subsection (d)'s notice procedure] to remove an individual from the official list of eligible voters if the individual—

> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id. § 20507(b)(2) (emphases added).

The "except" clause of subsection (b)(2) was added by the HAVA in 2002. In using the word "construed," the except clause does not change the meaning of subsection (b)(2); it clarifies what subsection (b)(2) has always meant. *See Alden v. Maine*, 527 U.S. 706, 722-23 (1999) (explaining that the use of the word "construed" in the Eleventh Amendment means it was enacted "not to change" but to "address[] the proper interpretation of ... the original"). The notice procedure in subsection (d) *never* "result[ed] in the removal of the name of any person ... by reason of the person's failure to vote." Although the failure to vote (in two consecutive elections) is one requirement under the notice procedure, it is the voter's *failure to respond to the notice*—not his failure to vote—that ultimately leads to his removal from the voting rolls.

Another provision of the HAVA makes the same point. Section 21083 expressly incorporates the notice procedure of the NVRA. It explains the notice procedure this way: "[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for

Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). The use of the word "solely" is telling. It confirms that, under the NVRA, a person's failure to vote can be *a* factor in removing him from the voter rolls. It just cannot be the *sole* factor.

This distinction is precisely the one that Congress meant to draw. Both the House and the Senate reports surveyed the state voter-registration policies existing at the time and explained how the NVRA would affect them:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. The "handful" of state programs that "remov[e] registrants from the list simply for not voting" were the ones the NVRA prohibited—not the majority of state programs that first "send a notice to assess whether the person has moved." H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46.

Ohio's Supplemental Process is not among the "handful" of programs the NVRA prohibited. Ohio sends a notice to anyone who fails to engage in any "voter activity" for two years. If the voter does not respond to the notice and does not vote (or appear) in two consecutive federal elections—the two requirements in subsection (d) of the NVRA—Ohio cancels his registration. As Judge Siler recognized, "no voter is removed solely by reason of a failure to vote" under Ohio's Supplemental Process. Pet. App. 35a (Siler, J., dissenting). A voter is removed only if he fails to respond to the notice. And a voter can stay registered by engaging in any kind of voter activity during this four-year period. *See* Pet. 10.

The Sixth Circuit nevertheless held that Ohio's Supplemental Process violates subsection (b)(2) of the NVRA. The Sixth Circuit gave three reasons for reaching this conclusion. None is persuasive.

First, the Sixth Circuit noted that the "trigger" for the notices sent out under the Supplemental Process "is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a (majority opinion). But, as the district court explained, the word "'trigger'" is "nowhere to be found in the NVRA." Pet. App. 56a. The NVRA explains that subsection (d)'s notice procedure complies with subsection (b)(2), and it does not limit "the events that need or need not happen before a state may initiate" that notice procedure. *Id.* at 58a. No matter what trigger a state chooses, the removal of a voter under subsection (d)'s notice procedure is premised on the voter's failure to respond to the notice—not on his failure to vote.

Second, the Sixth Circuit reasoned that, if a state's use of subsection (d)'s notice procedure automatically satisfies subsection (b)(2), then subsection (b)(2) would be reduced to "mere surplusage." *Id.* at 17a. After all, states are *required* to use subsection (d)'s notice procedure before they can remove a voter for changing his residence. *See id.* But this argument fails on multiple levels. For one, subsection (b)(2)'s prohibition on removing a voter solely for his failure to vote retains some "independent meaning" under Ohio's interpretation. *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 148-49 (1998). Unlike subsection (d), subsection (b)(2) is not confined to removal "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). No matter the meaning of subsection (d), then, subsection (b)(2) applies fully to the NVRA's other grounds for removal, including criminal conviction, mental incapacity, and death. *See id.* § 20507(a)(3)-(4).

Even in the context of changed residences, moreover, subsection (b)(2) is not superfluous. In the context of change-of-residence removals, subsection (d) and subsection (b)(2) are not two rules but one: together, they prohibit the practice of presuming that a non-voter has changed residences (and dropping him from the voter rolls) without first giving him notice. *See* H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. That Congress explained how this rule works in more than one provision is not surplusage; it is a helpful attempt to clarify how the statute operates. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007). Clarification was important because, as explained, it is not immediately obvious how subsection (b)(2) and subsection (d) coexist in the NVRA. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7

(1994) ("It is no superfluity for Congress to clarify what had been at best unclear ....").

Third, the Sixth Circuit invoked the "traditional rule" that a statute's exceptions should be "construed narrowly." Pet. App. 16a. But this "made-up canon" is illegitimate. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting). The Court has not invoked it consistently, *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 359-63 (2012), and it contradicts important principles of statutory construction, such as "'no legislation pursues its purposes at all costs'" and "[c]ongressional intent is discerned primarily from the statutory text," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

In any event, this canon cannot apply to the NVRA. The law serves *dual* purposes: increasing the registration of eligible voters and decreasing the registration of ineligible voters. *See* 52 U.S.C. § 20501(b). It is impossible to tell which purpose is the "general rule" and which purpose is the "exception." For example, the principle that a voter can be removed for failing to respond to a notice is framed as a rule, *see id.* §§ 20507(a)(4)(B); 21083(a)(4)(A), and as an exception, *see id.* § 20507(d)(1)(B). In subsection (b)(2), it is framed neither as a rule nor as an exception, but as a clarification. *Id.* § 20507(b)(2). Put simply, even if a canon that construes exceptions narrowly could ever be applied sensibly, it could not be applied sensibly here.

In sum, the Sixth Circuit's interpretation of the NVRA contradicts the law's text, structure, and history. The NVRA requires the states to remove individuals who

change their residence from the voter rolls. To do so, the NVRA allows the states to remove any individual who does not respond to a notice and does not vote in two consecutive federal elections; and it does not limit when the states can send those notices. Ohio's Supplemental Process follows this procedure. It complies with the NVRA.

B. The Sixth Circuit's decision contradicts the Justice Department's longstanding interpretation of the NVRA.

There is little support for the Sixth Circuit's interpretation of the NVRA. Indeed, *amici* have long taken the opposite view. When they were serving in the Civil Rights Division, the Justice Department *required* states to adopt procedures that are indistinguishable from Ohio's Supplemental Process. The Sixth Circuit's interpretation flouts this well-established history of enforcement.

For example, in 2007, the Justice Department sued the City of Philadelphia for violations of the NVRA, the HAVA, and the Voting Rights Act. *See* Am. Compl., *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2007 WL 1476781 (E.D. Pa. Apr. 26, 2007) [Dkt. No. 35]. With respect to the NVRA, the United States alleged that Philadelphia "fail[ed] to conduct a meaningful general program of voter registration list maintenance" and "d[id] not conduct a program that makes a reasonable effort to remove the names of ineligible voters." *Id.* ¶¶ 55-56. The parties ultimately settled. As part of that settlement, Philadelphia agreed to "send a forwardable confirmation notice to any registered elector who has not voted or appeared to vote during any election" and "remove inactive voters who

fail to appear to vote during the period beginning with the date of the confirmation notice and ending after the second federal general election following the date of the confirmation notice." Settlement Agreement ¶ 16, *United States v. Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007), *available at*, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/phila_settlement.pdf.

The settlement with Philadelphia was not an isolated agreement. During *amici*'s tenures, the Justice Department also negotiated similar agreements with the State of Indiana and Pulaski County, Arkansas. *See* Consent Decree and Order ¶ 4, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006) [Dkt. No. 4], *available at*, https://www.justice.gov/crt/consent-decree-and-order; Consent Order ¶¶ 4-8, *United States v. Pulaski County*, No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004) [Dkt. No. 9], *available at*, https://epic.org/privacy/voting/register/pulaski_cd.html.

All of these agreements required the defendants to adopt a program like Ohio's Supplemental Process. The defendants had to identify a list of nonvoters, send those nonvoters a notice asking them to confirm their address, and cancel the registration of voters who did not respond to the notice and did not vote in two consecutive federal elections. According to the Sixth Circuit, however, these agreements forced the defendants to violate federal law. *Amici* respectfully disagree. Because the Sixth Circuit's interpretation of the NVRA undermines these agreements and impugns this history of federal enforcement, it warrants this Court's reversal.

II. The Sixth Circuit's decision will undermine the states' efforts to maintain accurate voter rolls and to promote the integrity of elections.

Congress enacted the NVRA "to ensure that accurate and current voter registration rolls are maintained" and "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3)-(4). These objectives are complementary. "The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18. As this Court has recognized, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud," and "[a] good registration list will ensure that citizens are only registered in one place." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193-94 (2008) (opinion of Stevens, J.) (quoting Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005), https://goo.gl/y3jVi9). "[P]ublic confidence in the integrity of the electoral process," in turn, "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Programs like Ohio's Supplemental Process are an important tool in achieving these goals. Individuals who move to a new jurisdiction are no longer eligible to vote

in their old jurisdiction and should not remain registered there. Although states can track some of these voters through the Postal Service's change-of-address database, that data is underinclusive. Many people who change residences do not use this service. *See* Pet. 33-34. To maintain accurate voter rolls, states need to be able to use other reliable indicia of ineligibility—including a lack of voter activity.

Recent voter registration data justify Ohio's efforts. A 2012 Pew Study found major problems with the accuracy of voter rolls in the United States. According to the study, 24 million voter registrations (one out of every eight) are invalid or inaccurate. For example, 1.8 million deceased persons are listed as voters, and 2.75 million people are registered to vote in more than one state. *See* Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (2012), goo.gl/mQV8Ul. "Inflated voter lists are also caused by phony registrations and efforts to register individuals who are ineligible." *See* Comm'n on Fed. Election Reform, *supra*, at § 2.6. After the 2008 election, the Justice Department "sent letters to a dozen states inquiring about their list maintenance practices" because "there appeared to be significant imbalances between their numbers of registered voters and their citizen populations." U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* 38 (2009), goo.gl/xp7nhc (testimony of Christopher Coates, Acting Chief of the Voting Section). As of 2017, twenty-eight states participate in the Interstate Voter Registration Crosscheck Program (administered by the State of Kansas). This program analyzes the voter rolls of the participating states and identifies individuals

who are registered in more than one state. As of February 2017, the Crosscheck Program revealed hundreds of thousands of voters who were potentially registered in multiple states. Of the twenty-eight participating states analyzed in 2017, the following states had potential voter registration duplications with other participating states:

- Alabama – 239,801
- Arizona – 274,523
- Arkansas – 136,760
- Colorado – 286,035
- Georgia – 660,708
- Idaho – 28,113
- Illinois – 542,065
- Indiana – 516,700
- Iowa – 134, 186
- Kansas – 141,250
- Kentucky – 371,788
- Louisiana – 134,560
- Maine – 76,484

- Massachusetts – 191,734
- Michigan – 418,006
- Mississippi – 181,117
- Missouri – 288,949
- Nebraska – 76,005
- Nevada – 95,249
- New Hampshire – 94,610
- North Carolina – 561,811
- Ohio – 479,083
- Oklahoma – 118,347
- South Carolina – 368,189
- South Dakota – 41,920
- Tennessee – 296,494
- Virginia – 354,452
- West Virginia – 105,725

See Appendix at 1 (Kan. Sec'y of State, *Grid of Potential Duplicate Registrants Within States by DOB* (2017)).

These efforts have led to numerous prosecutions. Using the Crosscheck data, in 2008 and 2010, Kansas referred fourteen instances of double voting for prosecution, and Colorado indicted or referred to the FBI ten instances of double voting. *See* Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013), goo.gl/FQwRvQ.

Similarly, the Heritage Foundation has identified 938 recent criminal convictions for voter fraud in the United States—many involving false registrations and double voting. *See* Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated July 2017), https://goo.gl/yNoVdY. Numerous convictions involve individuals who voted in more than one state. For example, Regina Beaupre pleaded guilty in 2015 to voting in the same election in both Arizona and in Michigan. *Id.* at 15. James and Karen Marshall voted in both Arizona and Kansas in 2008. *Id.* at 21. Michael Hannum pleaded guilty to voting in Nebraska and Kansas in 2012. *Id.* at 127. Ron Weems pleaded guilty to voting in both Colorado and Kansas in the 2012 and 2014 elections. *Id.* at 128. Steven Gaedtke was convicted of voting in both Arkansas and Kansas in 2010. *Id.* at 129. Wendy Rosen (a candidate for Congress in Maryland) pleaded guilty to voting in both Florida and Maryland in 2010. *Id.* at 148. Pasco Parker admitted to voting in Florida, North Carolina, and Tennessee in the 2012 general election. *Id.* at 267.

Other individuals were convicted of voting twice in different parts of the same state. In Arizona, eight individuals—David Culberson, Adam Hallin, John Hamrick, Gerald Sack, Steven Streeter, Jay Thompson,

Franklin Turner, and Jeffery Hitchcock—pleaded guilty to attempted double voting in the 2012 general election. *Id.* at 11-15. In New Hampshire, Derek Castonguay pleaded guilty to voting in Salem and Windham in the 2014 election. *Id.* at 242. In Wisconsin, Todd Murray was convicted of voting in both New Berlin and West Allis in the 2012 election. *Id.* at 362.

Still other individuals cast ballots on behalf of deceased relatives who were not removed from state voter rolls. In California, Mark Evans cast a ballot in the name of his deceased father-in-law. *Id.* at 25. In Oregon, Lafayette Keaton pleaded guilty to casting multiple ballots using his deceased son's and brother's identities. *Id.* at 291.

The Government Accountability Institute ("GAI") also has identified numerous potential duplicate voters. *See America The Vulnerable: The Problem of Duplicate Voting*, Government Accountability Institute (2017), https://goo.gl/Mmqk6d. The GAI obtained and compared voter history and registration data from 21 states, representing 17 percent of the possible state-to-state comparison combinations. *Id.* at 2-3. The comparison included names, birthdates, and social security numbers. *Id.* at 3. It found 8,471 "highly likely" duplicate voters in the 2016 election—individuals who illegally voted in more than one state. *Id.* GAI estimated that extending its very conservative matching method to include all 50 states would indicate an expected minimum of 45,000 high-confidence duplicate voters. *Id.* at 3. The Institute also identified more than 15,000 voters registered at prohibited addresses including "post office boxes, UPS stores, federal post offices, and public buildings." *Id.* In one case, it found more than 100 voters registered at the same

UPS store and it found other voters whose registered home addresses matched the addresses of gas stations, vacant lots, abandoned mill buildings, basketball courts, parks, warehouses, and office buildings. *Id.* at 18-19.

Accurate voter rolls are vital in the effort to combat voter fraud. Bloated rolls "create[] a potential for people to fraudulently vote under the names of these illegally registered individuals." U.S. Comm'n on Civil Rights, *supra*, at 12 (executive summary of Coates's testimony). Efforts like Ohio's Supplemental Process not only comply with the NVRA; they are essential to achieving its purposes.

CONCLUSION

For all these reasons, this Court should reverse the Sixth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX — GRID OF POTENTIAL DUPLICATE REGISTRANTS WITHIN STATES BY DOB

[FOLDOUT]

2017

	Number of Voters	Invalid or Null Votes or Blanks	Voter Turnout Rate	Voter Not Voted Rate	Age Unknown	Voters with more than 1 vote	Overlap Rate Last 4	Out of Potential Duplicate Registrants Within States by Both Last Name Variation																										COMPARED TO 47 states
								AL	AZ	AR	CO	GA	ID	IL	IN	IA	KS	KY	LA	ME	MA	MI	MS	MO	NE	NV	NH	NC	OH	OK	SC	SD	TN	VA	WV	
	3,253,448	271	48	81	0	6,224	5,458		4,366	4,264	5,689	89,043	926	11,116	9,918	1,961	2,270	11,120	8,730	1,022	2,805	16,707	28,514	6,653	1,151	1,883	787	14,513	10,797	3,054	89,873	587	17,683	9,924	1,961	338,80
	4,074,389	1	61	64	0	14,038	4,095	4,366		4,534	32,634	16,189	3,630	32,041	20,848	8,678	5,568	9,317	3,021	2,007	5,805	27,943	3,181	10,382	4,881	15,308	3,703	13,648	12,549	6,103	9,123	4,897	9,464	9,478	2,906	374,62
	1,772,059	45	72	197	0	2,406	3	4,264	4,534		5,709	9,971	487	8,768	6,328	2,355	4,488	5,014	7,071	597	1,541	5,886	8,395	15,954	1,473	1,671	681	6,566	5,510	13,155	3,645	688	6,847	3,870	1,048	138,76
	3,680,466	0	3	61	3,795	4,802	621	5,689	30,634	5,709		21,158	2,894	25,009	17,121	8,158	12,736	6,387	5,550	3,547	8,027	18,105	3,612	13,448	3,835	7,524	3,144	18,236	15,602	9,825	7,870	5,049	7,431	13,196	2,925	288,63
	5,727,010	0	22	16	0	10,602	17	89,043	10,199	9,971	21,158		1,709	38,129	30,717	5,341	7,219	26,055	16,323	3,805	13,704	33,364	23,158	16,588	3,316	7,283	3,330	64,137	38,395	6,340	13,216	1,613	47,631	46,769	6,268	648,73
	787,534	0	18	83	3	124	171	926	3,630	487	2,894	1,709		1,678	1,490	626	688	983	384	299	492	1,349	395	955	371	1,807	267	1,428	1,365	608	785	427	884	1,587	267	28,11
	6,568,141	53,365	123	104	3	62,861	0	11,116	32,041	8,768	25,009	38,129	1,678		58,553	33,666	7,166	21,826	6,980	2,620	11,597	51,780	11,765	30,575	4,778	8,994	2,466	21,213	34,709	9,613	12,083	1,887	18,529	15,671	2,910	542,00
	4,938,512	3,437	62	208	22,511	28,631	3,698	6,913	20,545	6,323	17,131	30,717	1,490	58,553		7,430	9,436	12,830	5,561	1,837	8,009	56,361	7,554	18,477	2,776	5,169	1,852	24,088	57,189	6,697	15,635	1,600	19,111	14,630	4,054	515,49
	3,120,850	1	18	23	6	470	105	1,881	8,570	2,313	6,108	6,341	634	33,666	7,430		4,270	3,139	1,346	611	1,537	5,938	1,653	10,139	11,071	1,496	481	4,817	4,816	1,892	2,383	5,305	2,941	3,263	622	124,18
	1,795,864	6	15	108	8	784	318	2,215	5,840	4,458	12,724	7,273	688	7,186	5,450	4,270		3,241	1,703	837	1,443	4,427	1,036	39,001	8,440	1,883	488	5,145	4,828	10,517	2,740	1,548	2,082	3,572	602	141,25
	3,113,879	0	113	62	0	4,583	2	11,120	8,317	5,614	8,387	28,055	683	21,826	12,830	3,139	3,241		4,166	1,556	3,861	10,106	6,299	10,736	1,554	2,838	1,286	21,486	64,777	3,868	12,037	877	33,997	13,998	8,126	374,79
	2,976,391	0	2	2	43,221	783	0	6,730	3,923	7,071	5,501	18,332	364	6,886	5,581	1,349	1,709	4,166		805	2,305	5,009	21,700	5,013	640	1,519	658	9,571	5,810	3,004	3,878	353	6,071	4,382	1,177	34,88
	1,052,819	0	2	5	0	2,286	28	1,022	2,902	657	3,541	3,801	289	2,620	1,937	615	837	1,556	805		18,881	2,558	628	1,271	373	696	13,370	5,281	2,944	861	3,068	790	1,570	4,277	589	75,48
	4,461,777	112	48	27	0	2,102	28	2,095	5,309	1,341	8,021	13,734	493	11,087	8,009	5,557	1,643	3,287	2,181	18,881		10,256	1,450	4,847	877	2,079	40,364	15,687	9,980	1,826	7,736	452	3,636	14,482	1,239	191,79
	7,413,681	4	8	2	0	49,163	1	10,707	27,943	8,896	16,105	33,264	1,348	51,780	36,751	5,536	4,421	19,105	5,988	2,838	10,256		7,713	13,546	2,000	6,286	7,071	27,036	72,497	4,947	13,378	1,971	17,365	15,436	3,643	418,00
	2,362,809	392	382	238	19,561	25,946	150	20,514	3,181	6,296	3,017	23,130	388	11,765	7,555	1,635	1,599	6,299	21,700	609	1,450	7,713		6,813	952	1,884	471	8,838	6,557	2,036	5,166	456	21,336	5,739	1,230	191,11
	4,137,548	4	54	832	0	5,078	11,219	8,035	17,569	15,664	13,443	10,585	855	52,575	19,473	10,130	19,081	18,736	5,038	1,271	4,047	11,545	5,413		5,523	3,221	1,071	11,095	12,130	9,403	6,175	1,733	8,813	9,457	1,815	268,94
	1,215,139	1	18	62	0	668	8	1,101	4,897	1,423	5,035	5,516	321	4,778	2,774	11,971	5,445	1,581	644	372	877	2,850	952	5,523		1,208	274	3,654	2,911	1,548	1,529	3,088	1,357	1,945	444	78,95
	1,819,727	27	179	121	0	733	2	1,563	15,168	1,677	7,525	7,202	1,807	8,564	5,165	1,498	1,883	2,681	1,536	496	2,098	6,295	1,564	3,225	1,208		685	4,882	6,103	1,548	3,434	981	2,279	5,287	698	81,39
	901,639	0	41	11	0	1,414	118	787	2,709	467	1,144	3,358	263	2,486	1,853	467	486	1,201	616	13,376	40,364	2,031	471	1,071	274	696		5,481	2,612	563	3,443	181	1,314	4,232	491	84,61
	5,745,418	0	7	16	525,547	14,617	0	14,513	13,649	8,552	18,239	84,157	1,428	25,215	24,928	4,617	5,149	21,484	6,571	5,287	15,681	27,008	6,883	11,088	2,634	4,887	5,481		34,995	5,917	102,194	1,515	22,884	74,452	12,957	881,81
	7,858,276	0	5	21	0	8,990	1	10,787	17,645	5,518	10,882	39,380	1,301	34,705	97,100	4,010	4,020	64,771	5,613	2,844	9,186	52,491	9,557	12,130	2,611	5,102	2,612	34,995		8,544	20,811	1,099	17,070	20,758	20,928	479,39
	2,151,141	64	142	515	0	3,911	36	3,013	9,103	12,119	9,629	8,345	698	5,813	5,537	1,686	10,817	3,869	3,034	641	1,535	4,847	2,823	9,403	1,546	1,648	502	5,972	5,564		3,882	803	3,953	4,096	1,116	106,34
	3,265,337	0	0	157	65	5,833	3,029	10,873	8,123	3,645	7,029	16,216	709	12,063	15,576	2,353	2,748	12,633	3,815	3,768	7,706	13,378	5,166	6,379	1,528	2,454	3,443	102,104	20,611	3,093		913	12,328	21,705	1,543	168,18
	588,216	0	11	14	12	134	12	564	4,803	698	9,568	1,613	427	1,997	1,808	1,351	1,548	877	353	265	437	1,973	456	1,733	3,849	981	197	1,512	1,598	801	512		829	1,166	296	41,82
	3,858,716	258	45	91	5	4,810	2,587	17,052	9,464	8,847	7,435	47,031	684	18,626	18,113	2,541	3,663	10,691	5,071	1,670	3,829	11,888	21,325	8,602	1,353	2,270	1,314	32,284	17,979	3,551	12,338	823		13,054	3,310	288,48
	3,679,184	0	6	18	0	3,325	31	6,824	9,818	3,870	13,156	48,697	1,397	19,871	14,909	3,382	3,512	13,652	4,582	4,277	14,412	15,436	5,730	8,48	1,970	3,287	4,232	74,452	20,754	4,565	21,705	1,196	13,054		16,453	354,45
	1,239,953	0	53	24	0	3,712	1,366	5,857	7,098	1,018	2,529	8,268	293	2,985	4,064	681	830	5,305	1,171	581	1,215	3,697	1,250	1,816	444	638	457	12,953	20,978	1,168	7,943	259	3,310	16,453		179,12
	99,243,362							215,80	278,023	138,700	288,206	680,708	28,613	542,085	518,700	156,189	161,250	371,488	134,969	10,604	181,734	418,096	151,117	208,840	18,000	68,240	64,010	981,81	478,083	118,867	368,189	47,820	366,484	356,452	100,731	

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No. 16-980

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GEORGIA AND 16 OTHER STATES AS AMICI CURIAE SUPPORTING PETITIONER

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National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 ..... *passim*

OTHER AUTHORITIES

1A *Sutherland Statutory Construction* § 21:11 (7th ed.) 18

2A *Sutherland Statutory Construction* § 47:11 (7th ed.) 17

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012) 6, 7, 17, 18

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Result in, Merriam-Webster Online Dictionary, https://goo.gl/bKNwVG (last visited Aug. 2, 2017) 7

Result in, New Oxford American Dictionary (3d ed. 2010) 7

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W. Keeton, Dan B. Dobbs, et al., *Prosser and Keeton on Torts* § 65 (5th ed. 1984) 11

INTERESTS OF AMICI CURIAE

Above all else, Georgia and the other amici States need to know, with specificity, how they can meet their list-maintenance obligations under the National Voter Registration Act (NVRA) lawfully. Many states require or at least permit list-maintenance programs similar to the Ohio program challenged in this case (Pet. 17-18), and they need a clear answer on whether the NVRA permits it – and if not, what specific steps the NVRA permits states to take to comply with their statutory obligations. This clarity matters a great deal because many of the amici States are regularly threatened with or involved in burdensome litigation regarding list-maintenance programs. Some challenges are like this one, alleging that a list-maintenance process removes people who should not be removed. Other times the challenge comes from the other side, alleging that a state has not sufficiently complied with its obligation to maintain accurate registration lists. And some states are whipsawed with both kinds of litigation at the same time. Pet. 19-21. At a minimum, the states need this Court to help end this churn of litigation by explaining in clear terms the NVRA's limits on how states may carry out their statutory obligations.

The amici States also have an interest in preserving accurate, effective, and efficient means of conducting list maintenance. Keeping a statewide voter-registration list and implementing a system that removes ineligible voters from that list as the NVRA requires is a substantial and expensive undertaking. States with finite resources need targeted,

efficient ways to remove ineligible voters while ensuring that they keep eligible voters on the list. Relying on change-of-address data from the U.S. Postal Service is one way, but using that data alone certainly will leave many ineligible voters on states' lists; after all, a great many people do not notify the Postal Service when they move. Pet. 33-34. States could hypothetically send mass mailings to *all* voters, but this approach could be prohibitively expensive. Pet. 34. Thus, many states require or permit list-maintenance processes similar to Ohio's, which begins an address-confirmation procedure the NVRA expressly permits by sending confirmation notices only to voters who have had no contact with elections officers for some time. The amici States believe this process and others like it are accurate, cost-effective, and permissible means of carrying out their list-maintenance obligations under the NVRA.

SUMMARY OF ARGUMENT

The NVRA requires the states to implement programs that make reasonable efforts to remove from voter-registration lists the names of people who have moved or passed away. To this end, the NVRA permits states to remove a person's name from the voter-registration list if the person fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general federal elections (the "Confirmation Procedure"). The NVRA also prohibits states from executing a program that "result[s]

in the removal of" a person's name from a voter list "by reason of the person's failure to vote" (the "Failure-To-Vote Clause").

Careful application of the relevant canons of construction makes clear that a state does not violate the NVRA's Failure-To-Vote Clause by doing what Ohio does: using failure-to-vote data to identify registered voters who may have moved, and then sending those voters address-confirmation notices as the Confirmation Procedure permits.

First, applying the ordinary-meaning canon avoids the court of appeals' mistaken importation of a "but for" causation standard into the Failure-To-Vote Clause.

Second, applying the prior-construction canon makes clear that Congress incorporated a proximate-cause standard into the Failure-To-Vote Clause by using the phrase "by reason of." Under any of the various formulations of the proximate-cause standard, a person's failure to vote does not proximately cause the removal of a person's name from the official list of voters under Ohio's list-maintenance process.

Third, applying the whole-text canon shows that the Failure-To-Vote Clause incorporates a specific proximate-cause standard: the common-law formulation of the standard that cuts off liability if a proximate cause was not the *sole* proximate cause.

Fourth, the harmonious-reading canon confirms that the Failure-To-Vote Clause does not categorically

prohibit considering failure-to-vote data as part of a list-maintenance process. If it did, then Congress wrote into the NVRA an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure. The harmonious-reading canon precludes such a reading when, as here, a more harmonious one is available.

Fifth, acknowledging the difference between provisos and exceptions further supports not treating the Failure-To-Vote Clause as a categorical prohibition on the use of failure-to-vote data. The Help America Vote Act's (HAVA's) later-enacted clarification of the Failure-To-Vote Clause is best read as a proviso because it expressly serves as a rule of construction, not an exception to a general prohibition. As such, that Clarification Amendment simply explains that the Failure-To-Vote Clause *itself* does not prohibit states from using failure-to-vote data for list maintenance as part of the Confirmation Procedure. For that to be true, the Failure-To-Vote Clause has to be something less than a categorical prohibition.

ARGUMENT

To protect the integrity of the electoral process, the NVRA requires each state to conduct a program that "makes a reasonable effort to remove" from its voter registration list the names of people who have moved or passed away. 52 U.S.C. § 20507(a)(4).

This case concerns seemingly conflicting statutory instructions given to states carrying out this list-maintenance obligation. On one hand, the NVRA permits states to remove a person's name from the voter registration list if the person fails to respond to an address-confirmation notice and then also fails to vote (or appear to vote) in the next two consecutive general federal elections. 52 U.S.C. § 20507(d)(1)(B) ("Confirmation Procedure"). On the other hand, the Act prohibits states from executing a program that "result[s] in the removal of" a person's name from a voter list "by reason of the person's failure to vote." *Id.* § 20507(b)(2) ("Failure-To-Vote Clause").

Ohio implemented the NVRA's Confirmation Procedure for removing people's names on the ground that they have moved. Ohio sends the notice required by the Confirmation Procedure if a person has not voted (or otherwise had contact with election officials) for two years. Respondents in this case sued Ohio's Secretary of State for using that process, and that ultimately gave rise to the question of statutory construction presented here: Does a state violate the NVRA's Failure-To-Vote Clause by using failure-to-vote data to identify registered voters who may have moved, and then sending those voters address-confirmation notices as the Confirmation Procedure permits?

Petitioner Husted has provided many good reasons for concluding that the NVRA allows such a process. The amici States highlight and expand on a particular set of those reasons here. Specifically, we will show that careful application of the relevant

canons of statutory construction support Ohio's position. What follows is a guide for applying those canons, which will show that, contrary to the court of appeals' conclusion, the NVRA does not prohibit states from sending address-confirmation notices to people after they have not voted for a set amount of time.

A. Apply the ordinary-meaning canon: assume the contextually appropriate ordinary meaning of words.

Most common English words have numerous dictionary definitions. The ordinary-meaning canon requires courts to apply the one that is appropriate in light of the word's context. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012) ("One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise."); *see also Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (a word "takes on different meanings in different contexts").

We start with the ordinary-meaning canon and its focus on context because this is where the court of appeals first derailed in construing the Failure-To-Vote Clause. That clause provides that a state's list-maintenance program "shall not *result in* the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). A quick review of dictionaries reveals that the word "result" can take on many meanings. "Yet context disambiguates." Scalia &

Garner, *supra* at 70. "Result in" is a transitive phrasal verb, *i.e.*, a verb-plus-preposition that has an object (here, "the removal"). *See, e.g.*, *Result in, Macmillan Dictionary*, https://goo.gl/hdTfRa (last visited Aug. 2, 2017). The transitive phrasal verb "result in" means "to cause (something) to happen" or "to produce (something) as a result." *Result in, Merriam-Webster Online Dictionary*, https://goo.gl/bKNwVG (last visited Aug. 2, 2017); *see also Result in, New Oxford American Dictionary* (3d ed. 2010) ("have (a specified end or outcome)"); *Result in, Cambridge Phrasal Verbs Dictionary* (2d ed. 2006) ("to cause something to happen, or to make a situation exist"); *Result in, Oxford Dictionary of Phrasal Verbs* (1st ed. 1993) ("have (sth) as an outcome or consequence").[1]

Applying the contextually appropriate ordinary meaning of "result in," the Failure-To-Vote Clause provides that a state's list-maintenance program "shall not result in" – *i.e.*, cause or produce – "the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

Violating the ordinary-meaning canon was the court of appeals' first mistake. Instead of recognizing and then construing the transitive phrasal verb "result in," the court of appeals ignored context and adopted a definition of the intransitive verb "result," *i.e.*, "to

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[1] A related canon that also supports this construction: "[W]ords are to be given the meaning the proper grammar and usage would assign them." Scalia & Garner, *supra* at 140 (citing *Flora v. United States*, 362 U.S. 145, 150 (1960)).

proceed or arise as a consequence, effect, or conclusion." Pet. App. 21a (citations omitted). Because the court picked a definition of the wrong verb form of "result," using its chosen definition in context renders the Failure-To-Vote Clause nonsensical. Inserting the court of appeals' definition of "result" where that term sits within the text of the Failure-To-Vote Clause looks like this: A state's list-maintenance program "shall not [*proceed or arise as a consequence, effect or conclusion*] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). The definition the court of appeals chose makes no sense placed where it is supposed to fit in the statute Congress wrote and enacted.

By contrast, applying the contextually appropriate ordinary meaning of "result in" fits comfortably in the Failure-To-Vote Clause, both grammatically and linguistically. Under that construction, the Clause provides that a state's list-maintenance program "shall not [*cause or produce*] the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." *Id.*

B. Apply the prior-construction canon: when courts have settled the meaning of statutory language, presume the same language enacted in a new statute carries the same meaning.

Congress does not write on a blank slate. It passes laws and courts interpret them. When Congress passes new laws and uses the same language it used in those old laws, the judicial interpretations of that language ordinarily come along for the ride. That, in a nutshell, is the prior-construction canon. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

The prior-construction canon plays a key role here. Under the Failure-To-Vote Clause, state list-maintenance programs may not cause the removal of voters "*by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). The phrase "by reason of" is a well-known statutory term of art. As this Court has repeatedly held, that phrase incorporates the proximate-cause standard, a type of causation that is significantly narrower than "but for" causation. *See, e.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-35 (1983); *see also Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 221-22 (2012). Because this Court had settled this meaning of "by reason of"

before the NVRA was enacted, Congress's "repetition of the same language in" the Failure-To-Vote Clause indicates an "intent to incorporate" the technical legal sense of the phrase in that clause. *Bragdon*, 524 U.S. at 645.

Applying the ordinary meaning of "result in" and this Court's prior constructions of "by reason of" here, the Failure-To-Vote Clause provides that a state's list-maintenance program "shall not result in" – *i.e.*, cause or produce – "the removal of the name of any person from the official list of voters . . . by reason of" – *i.e.*, proximately caused by – "the person's failure to vote." 52 U.S.C. § 20507(b)(2). The upshot: to show that a state list-maintenance process violates the Failure-To-Vote Clause, a plaintiff must show that the state has made failure to vote a proximate cause of the removal of a person from the official list of voters.

Proximate cause is "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Courts have implemented that policy-based judgment with various formulas. *Id.* at 693, 701. Some have required a "direct relation between the injury asserted and the injurious conduct alleged," and excluded any "link that is 'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (alteration in original) (quoting *Holmes*, 503 U.S. at 268, 271). Others have applied various tests, including "the immediate or nearest antecedent test;

the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, or foreseeable consequence test." *CSX Transp.*, 564 U.S. at 701 (citations omitted). Still others have "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, Dan B. Dobbs, et al., *Prosser and Keeton on Torts* § 65, p. 452 (5th ed. 1984) (noting the "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury")).

Under any of the various formulations of the proximate-cause standard, a person's failure to vote does not proximately cause the removal of a person's name from the official list of voters under Ohio's list-maintenance process. Removal is not, for instance, *directly related* to a person's failure to vote, because it is *more closely related to* and *purely contingent on* a person's failure to respond to the address-confirmation notice sent as part of the Confirmation Procedure. A person's failure to respond to the address-confirmation notice is, in other words, the *immediate* and *nearest antecedent* of removal. And a person's failure to vote is in any event not the *sole* proximate cause of removal, because a person has to fail to respond to the address-confirmation notice before they may be ultimately removed from the list on the basis that they have moved.

The court of appeals did not apply the prior-construction canon to construe "by reason of" because it wrote that key phrase out of the statute altogether. Compounding its failure to assign the contextually

appropriate meaning to "result," the court silently substituted that incompatible definition for "by reason of." This is how the court reached its "construction" that says a state violates the Failure-To-Vote Clause when "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." Pet. App. 21a. The court thus incorporated a largely boundless standard of but-for causation into that clause, which opened the door for the court to interpret it to categorically prohibit consideration of failure-to-vote data in a list-maintenance process. *See* Pet. App.14a-15a, 20a-21a.

C. Apply the whole-text canon: construe the language and design of the statute as a whole.

Since context determines meaning, it makes sense to consider the entire context of the language under construction. With statutory construction, that means looking not only to the provision in question, but also to "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

This whole-text canon allows us to ascertain the particular proximate-cause standard the Failure-To-Vote Clause incorporates. Although common-law formulations of the proximate-cause standard varied, the standard is sometimes statute-specific. *CSX Transp.*, 564 U.S. at 693, 700 & 701; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) ("Proximate-cause analysis is controlled by the nature of the statutory cause of action."). And statutory context provides good reasons to believe that

the Failure-To-Vote Clause incorporates a specific proximate-cause standard: the common-law formulation of the proximate-cause standard that "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *CSX Transp.*, 564 U.S. at 693 (citation omitted).

First, the Confirmation Procedure enacted contemporaneously with the Failure-To-Vote Clause contemplates that a state *may* consider a person's failure to vote if the state *also* considers the person's failure to respond to an address-confirmation notice. 52 U.S.C. § 20507(d)(1)(B). Unless we are to believe that Congress wrote contradictory provisions into the NVRA (*but see infra* section C. (applying the harmonious-reading canon, which presumes otherwise)), its inclusion of the use of failure-to-vote data as part of the Confirmation Procedure shows that the Failure-To-Vote Clause does not prohibit removing voters for failing to vote *plus something else*. *See also* H.R. Rep. No. 103-9, at 30 (1993) (Failure-To-Vote Clause was intended to "prohibit states from removing registrants from the list *simply for not voting*." (emphasis added)); S. Rep. No. 103-6, at 46 (1993).

Second, and perhaps most telling, Congress later made this sole-proximate-cause standard explicit. With HAVA, Congress required the states to create "file maintenance" systems that cause the removal of voters under the NVRA's Confirmation Procedure. 52 U.S.C. § 21083(a)(4)(A). The same provision setting out that requirement repeated the Failure-To-Vote Clause's prohibition, with one textual edit: it warned that "no registrant may be removed *solely* by reason of

a failure to vote." *Id.* (emphasis added). Importantly, this addition of "solely" cannot be read as a later relaxation of a (purportedly) formerly categorical Failure-To-Vote Clause, because HAVA forbade construing that Act "to authorize . . . conduct prohibited under . . . the [NVRA]." 52 U.S.C. § 21145(a)(4). Accordingly, the only sensible conclusion is that the Failure-To-Vote Clause *already* included, and still includes, the sole-proximate-cause standard that HAVA made express.

In sum, the Failure-To-Vote Clause incorporates a statute-specific proximate-cause standard that prohibits a state from conducting a list-maintenance program from removing voters *solely* because they failed to vote. Ohio's list-maintenance program does not do that, because it *also* requires that the voter failed to return an address-confirmation notice before removal is permitted.

As with the prior-construction canon, the court of appeals had no occasion to apply the whole-text canon to determine the applicable proximate-cause standard because it mistakenly wrote "by reason of" out of the statute entirely.

D. Apply the harmonious-reading canon: when possible, read provisions of the same text to harmonize, not conflict.

Drafters of statutes ordinarily do not contradict themselves (at least not on purpose). Courts therefore construe statutes so one provision does not contradict another. The "task is to fit, if possible, all parts into an

harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" (citations omitted)).

Applying this harmonious-reading canon here confirms that the Failure-To-Vote Clause does not categorically prohibit considering failure-to-vote data as part of a list-maintenance process. To see why, consider the apparent tension between that clause and the Confirmation Procedure: The Failure-To-Vote Clause prohibits list maintenance that results in voter removal by reason of failure to vote, while the Confirmation Procedure permits removal once a person fails to respond to a confirmation notice and then *fails to vote*. Under the court of appeals' reading, the Failure-To-Vote Clause categorically prohibits conduct that the Confirmation Procedure affirmatively requires if a state wants to use the list-maintenance process it explicitly permits.

By contrast, identifying proximate cause as the causation standard for the Failure-To-Vote Clause (as supported by the prior-construction and whole-text canons) harmonizes these clauses. The Confirmation Procedure does not conflict with a Failure-To-Vote Clause that prohibits only making failure to vote a *proximate* cause of voter removal. Removal of voters under that procedure is not the *sole* proximate cause

of removal, and removal is also *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice. The harmonious-reading canon favors that reading over one that puts two statutory provisions from the same Act in open and irreconcilable conflict.

The court of appeals recognized that interpreting the Failure-To-Vote Clause to categorically prohibit consideration of failure-to-vote data led to such a conflict. *See* Pet. App. 14a-15a. The court attempted to resolve that conflict by pointing to the clarifying language that HAVA appended to the Failure-To-Vote Clause. That "Clarification Amendment" stated: "nothing in [the Failure-To-Vote Clause] may be construed to prohibit a State from . . . remov[ing] an individual from the official list of eligible voters if the individual" fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. 52 U.S.C. § 20507(b)(2). The court of appeals held that, "under the [Clarification Amendment's] plain language," the Confirmation Procedure "is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote." Pet. App. 15a.

But that line of reasoning contains an obvious flaw: it is anachronistic. As enacted in 1993, the NVRA included both the Failure-To-Vote Clause and the Confirmation Procedure. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77, 83-84. HAVA's Clarification Amendment, however, was not introduced into the NVRA until 2002. *See* Help

America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1728. This means that under the court of appeals' reading, there was an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure from 1993 until 2002: The first categorically prohibited conduct that the second affirmatively required as part of a permitted list-maintenance process.

The better reading is that the Failure-To-Vote Clause and the Confirmation Procedure do not conflict because the first only prohibits making failure to vote the sole proximate cause of voter removal, and implementing the Confirmation Procedure does not do that.

E. Acknowledge the difference between provisos and exceptions and treat them accordingly.

There is a "technical distinction between an exception and a proviso." *United States v. Cook*, 84 U.S. 168, 177 (1872). "A true statutory exception exists only to exempt something which would otherwise be covered by an act." 2A *Sutherland Statutory Construction* § 47:11 (7th ed.). Provisos, by contrast, function as rules of construction and are thus "commonly used to limit, restrain, or otherwise modify the language of the enacting clause." *Quackenbush v. United States*, 177 U.S. 20, 26 (1900); *accord* Scalia & Garner, *supra* at 154 (noting that a proviso "modifies the immediately preceding language").

Ideally exceptions would be introduced with "except that" and provisos with "provided that," so the reader could easily identify which was which. But poor

drafting is common, so it is not uncommon to see the opposite: provisos introduced with "except that" and exceptions introduced with "provided that." *See* Scalia & Garner, *supra* at 154. Thus, the "particular form of the words used to introduce the applicable provision generally does not determine whether it should be classed a proviso or an exception." 1A *Sutherland Statutory Construction* § 21:11 (7th ed.). Instead, the function of a provision controls that determination.

By that standard, the Clarification Amendment rests comfortably in the proviso camp. Although that clause starts with "except that," its plain language and context confirms that it functions as a proviso: a rule for how to construe the Failure-To-Vote Clause. Specifically, the Confirmation Amendment provides that "nothing in [the Failure-To-Vote Clause] *may be construed* to prohibit" certain conduct. 52 U.S.C. § 20507(b)(2) (emphasis added). In addition, the heading that preceded the amendment in HAVA reads, "*[c]larification* of ability of election officials to remove registrants from official list of voters on grounds of change of residence" (and not, for example, "exception to prohibition on removing voters by reason of failure to vote"). Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1728 (emphasis added); *see also* H.R. Rep. No. 107-730, at 81 (2002).[2] The Clarification Amendment is therefore best read as a proviso

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[2] Another canon of construction: Because titles and captions are adopted by Congress, they are permissible indicators of meaning. *See, e.g.*, *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

– a rule of construction that clarifies the meaning of the Failure-To-Vote Clause.

That reading is confirmed by this Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 582 (1988). In *DeBartolo*, the Court interpreted a provision that, like the Clarification Amendment, included a "shall not be construed" command. *Id.* The Court rejected an interpretation that treated "the proviso as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Id.* It noted that the proviso had "a different ring to it" because it included the "shall not be construed" command. *Id.* Then, consistent with the argument made above, the Court interpreted the proviso as a "clarification" "rather than an exception to a general ban." *Id.* at 586. That line of reasoning applies here as well.

This proviso/exception distinction matters here because it determines just what the Clarification Amendment says about how to read the Failure-To-Vote Clause. If the amendment were an exception – which is how the court of appeals treated it – that might leave open the possibility that the Failure-To-Vote Clause is a categorical prohibition on considering failure-to-vote data from which the amendment merely provided an exemption. By contrast, as a proviso, the Clarification Amendment explains that the Failure-To-Vote Clause *itself* permits states to use failure-to-vote data for list maintenance at least as part of the Confirmation Procedure. And for that to be true, the Failure-To-Vote Clause has to be something

less than a categorical prohibition on using failure-to-vote-data as part of a list-maintenance process.

Put simply, that the Clarification Amendment is a proviso that serves as further confirmation that (1) the court of appeals' decision is wrong and (2) the Failure-To-Vote Clause only prohibits removing voters based on failure to vote as the sole proximate cause of the removal.

CONCLUSION

Careful application of the appropriate canons of construction confirms that the NVRA does not prohibit Ohio's list-maintenance program. The decision below should be reversed.

Respectfully submitted,

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JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR ERIC H. HOLDER, JR., THOMAS E. PEREZ, BILL LANN LEE, DEVAL L. PATRICK, LORETTA KING, WILLIAM R. YEOMANS, JAMES P. TURNER, PAMELA S. KARLAN, MATTHEW COLANGELO, JULIE A. FERNANDES, SAMUEL R. BAGENSTOS, SPENCER A. OVERTON, ANITA S. EARLS, JOSEPH RICH, J. GERALD HEBERT, GILDA R. DANIELS, AND ROBERT KENGLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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52 U.S.C. § 20502(2) 30

Section 8(a), 52 U.S.C. § 20507(a) ..... *passim*

Section 8(b), 52 U.S.C. § 20507(b) ..... *passim*

Section 8(c), 52 U.S.C. § 20507(c) 16, 22, 24

Section 8(d), 52 U.S.C. § 20507(d) ..... *passim*

Pub. L. No. 103-31 § 8(b)(2), 107 Stat. 77, 87 (1993) 18

Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ..... *passim*

52 U.S.C. § 21083(a) 20, 23, 26, 27

52 U.S.C. § 21145(a) 24

52 U.S.C. § 30101(3) 30

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H.R. Rep. No. 103-9 (1993) 9

Black's Law Dictionary (10th ed. 2014) 22

Ronald Brownstein, *The Great Midterm Divide*, THE ATLANTIC, Nov. 2014, https://goo.gl/P3QSBn 15

Civil Rights Div., Dep't of Justice, *The National Voter Registration Act of 1993 (NVRA)*, https://goo.gl/fMWdc8 ..... 16, 17, 36

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Drew DeSilver, *Voter Turnout Always Drops Off for Midterm Elections, But Why?*, PEW RESEARCH CENTER FACTANK, July 24, 2014, https://goo.gl/84ZHKE 15

Richard Holden, *Voting and Elections: New Social Science Perspectives*, 12 ANN. REV. L. & SOC. SCI. 255 (2016) 13

Jon Husted, Ohio Sec'y of State, Directive No. 2011-15 at 1 (Apr. 18, 2011), https://goo.gl/frd7Pb 12

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Nat'l Ass'n of Secretaries of State, *Maintenance of State Voter Registration Lists* (Oct. 6, 2009), https://goo.gl/wgjiAC 17, 25

LYN RAGSDALE & JERROLD G. RUSK, THE AMERICAN NONVOTER (2017) 13, 15

Statement of Interest of the United States, *Common Cause v. Georgia*, No. 1:16-cv-452-TCB (N.D. Ga., filed May 4, 2016) 37

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former attorneys for the United States Department of Justice, all of whom had responsibility for the Department's interpretation and enforcement of the National Voter Registration Act, 52 U.S.C. § 20501 *et seq.* ("NVRA"). *Amici* include individuals who served as career civil servants, as well as those who held politically appointed positions. *Amici* have served in both Republican and Democratic administrations.

In his brief, the Solicitor General has renounced the interpretation of the NVRA that the Department repeatedly endorsed since the statute's enactment in 1993 – an interpretation that the Department endorsed even in its brief in this very case in the Sixth Circuit. Unusually, the Solicitor General's brief was not signed by a single career attorney in the Civil Rights Division, the component of the Department that is responsible for enforcing the NVRA provisions at issue here. And the Solicitor General explicitly described "the change in Administrations" as having motivated his renunciation of the Department's prior interpretation. U.S. Br. 14. *Amici* submit this brief in their individual capacities to provide the Court with the Department's longstanding view of the Question

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[1] Pursuant to S.Ct. R. 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case.

Presented, the view the current administration has abandoned.

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SUMMARY OF ARGUMENT

I. Under Ohio's "supplemental process," the failure to vote is both the reason the state initiates its voter-purge procedure and the most immediate cause of a registrant's removal from the rolls at the end of that procedure. That process violates the NVRA. It is not a "reasonable effort" to identify voters who changed their residence, 52 U.S.C. § 20507(a)(4)(B), and it "result[s] in the removal" of a registrant "by reason of the person's failure to vote," *id.* § 20507(b)(2).

When Congress adopted the NVRA, it declared the right to vote to be a fundamental right. As with other fundamental rights of expression and association, Congress recognized that the right to vote includes a right

not to vote. It accordingly sought to protect citizens against being penalized for nonvoting by being purged from the voter rolls. The NVRA provided that voters may be removed from the rolls for only four reasons: the registrant's request; criminal conviction or mental incapacity; death; or a change in residence. The statute specifically barred practices that result in the removal of a registrant due to the failure to vote.

Ohio defends its "supplemental process" as a means of identifying voters who have changed their residence. But the text and structure of the NVRA make clear that the failure to vote – even when followed by the mail-notice procedure required by the statute – is not a "reasonable" means of identifying those individuals who have become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). There are simply too many competing explanations for a voter's failure to cast a ballot at a particular election. Congress recognized these problems when it adopted the NVRA. Under the one means specifically listed in the statute for identifying voters who have moved, a state would begin the mail-notice voter-purge process only *after* it had obtained independent information – in the form of a listing on the Postal Service's change of address database – that the voter had in fact moved. Although the NVRA does not require a state to use the Postal Service's database, the "reasonableness" standard requires, at a minimum, that the state have some reliable, independent indication that a voter has moved before initiating the voter-purge process.

In addition to being an unreasonable means of identifying voters who have moved, Ohio's "supplemental process" violates the failure-to-vote clause in the NVRA and the parallel language in the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ("HAVA"). Under Ohio's process, the failure to vote is both the trigger that sets the purge process in motion and the final step that leads to the removal of a voter from the rolls. The state argues that the failure to vote is not the "sole proximate cause" of the removal, because the voter must also have failed to respond to a notice mailed by election officials. But that argument denies effect to the failure-to-vote clauses in the NVRA and HAVA. It also disregards ordinary principles of proximate causation. If the failure-to-vote clauses mean anything, they must mean that a state may not use nonvoting as a basis for initiating the mail-notice purge process. Although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from using nonvoting to *derive* its belief that a voter has changed her residence.

Ohio argues that its interpretation of the NVRA is supported by the canon of constitutional avoidance. But reading the NVRA to bar the "supplemental process" raises no serious constitutional question. To the contrary, it is Ohio's interpretation that would raise serious constitutional questions, by reading the NVRA to have empowered states to remove citizens from the

rolls simply for exercising their protected right not to vote.

II. In the Sixth Circuit, the United States contended that Ohio's "supplemental process" violates the NVRA. That argument was consistent with the Department of Justice's longstanding interpretation of the NVRA. From 1994 until the Solicitor General's brief in this case, the Department had repeatedly expressed its view that the statute prohibits states from initiating a voter-purge process based merely on the failure to vote.

The Department took that position in litigation and correspondence with states in the 1990s, shortly after the NVRA became law. After HAVA's 2002 enactment, the Department negotiated settlement agreements in Arkansas (in 2004), Indiana (in 2006), and New Mexico (in 2007), all of which barred the defendants from initiating a voter-purge process based on nonvoting. A 2007 settlement agreement with the City of Philadelphia contained some language that might appear inconsistent with those other decrees, but that agreement did not, in context, undermine the Department's longstanding interpretation. In 2010, the Department issued extensive guidance regarding the application of the NVRA – guidance that specifically reaffirmed that the failure to vote cannot be the basis for commencing a purge process. And the Department subsequently defended that interpretation in the lower courts. The Solicitor General's brief thus

marks a significant departure from the Department's longstanding position.

ARGUMENT

I. The NVRA Prohibits Ohio's "Supplemental Process"

Under Ohio's "supplemental process," the failure to vote is the reason the state initiates its voter-purge procedure by sending a confirmation notice. The failure to vote is also, as the Solicitor General acknowledges, "the most immediate cause" of a voter's removal *after* the state sends that notice. U.S. Br. 19 n.5. That process is not, as the NVRA requires, a "reasonable effort" to identify voters who are "ineligible" by reason of a change in residence. 52 U.S.C. § 20507(a)(4)(B). To the contrary, it violates the statute by "result[ing] in the removal of" a registrant "by reason of the person's failure to vote." *Id.* § 20507(b)(2).

A. The NVRA Protects Both the Right to Vote and the Right Not to Vote

When it adopted the NVRA, Congress declared that "the right of citizens of the United States to vote is a fundamental right." 52 U.S.C. § 20501(a)(1). Congress recognized that, as with other fundamental rights, the right to vote includes a right *not* to vote. The House and Senate Reports explained that the NVRA aimed "to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long

as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6 at 17 (1993) ("Senate Report"). Accord H.R. Rep. No. 103-9 at 18 (1993). The Senate Report noted that citizens not only have the affirmative right to vote; they also "have an equal right not to vote, for whatever reason." Senate Report at 17. And it explained that the statute sought to prevent states from "penaliz[ing] such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election." *Id.* "Such citizens," the Report went on, "may not have moved or died or committed a felony. Their only 'crime' was not to have voted in a recent election." *Id.* Quoting the testimony of Rev. Jesse Jackson, the Report observed: "'No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue.'" *Id.*

Congress's understanding of the right to vote – and the right *not* to vote – resonates with two important strands of this Court's cases. First, the Court has recognized that voting is an important means of expression and association. Voting is the ultimate expression of one's political preferences. And it is a means of associating with others to express support for a political candidate and the agenda for which that candidate stands. See, *e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992) (describing voting for a chosen political party as implicating "the constitutional interest of like-minded voters to gather in pursuit of common political end" and to "express their own political

preferences"); *Anderson v. Celebrezze*, 460 U.S. 780, 787-788 (1983) (describing voting for a preferred candidate as an aspect of an individual's "right to associate with others for political ends"); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (describing "the right to vote" as "that of having a voice in the election of those who make the laws") (internal quotation marks omitted). Cf. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (discussing "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"). In *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1440-1441 (2014), Chief Justice Roberts's plurality opinion specifically included "vot[ing]" along with "run[ning] for office," "urg[ing] others to vote for a particular candidate, volunteer[ing] to work on a campaign, and contribut[ing] to a candidate's campaign," all as components of the "right to participate in electing our political leaders."

Second, this Court has recognized that the rights to speak and associate include a right *not* to speak and associate. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (describing "[t]he right to speak and the right to refrain from speaking" as "complementary").

The NVRA's protection of the right not to vote is most overt in the failure-to-vote clause, 52 U.S.C.

§ 20507(b)(2), which we discuss in Part I.C., *infra*. But the statute's express, narrow limitations on the circumstances in which states may remove properly registered voters from the rolls, which we discuss in Part I.B., immediately below, plainly advance the same end. By recognizing that citizens do not lose their right to vote in future elections by failing to vote in past elections, the NVRA underscored the important principle that the right to vote includes a right not to vote.

B. Under the NVRA's Narrow Limitations on Removing Registrants, States May Not Initiate a Voter-Purge Process Based on the Failure to Vote

As an exercise of Congress's Elections Clause power, the NVRA did not, of course, simply adopt the rules this Court has applied in its First Amendment jurisprudence. But the statute did impose narrow limitations on the circumstances in which states may remove registered voters from the rolls. Those limitations prohibit states from using the mere failure to vote as the basis for initiating a voter-purge process.

Section 8(a)(3) of the NVRA, 52 U.S.C. § 20507(a)(3), directs that "the name of a registrant may not be removed from the official list of eligible voters except" for the following delineated reasons: "at the request of the registrant," *id.* § 20507(a)(3)(A); "as provided by State law, by reason of criminal conviction or mental incapacity," *id.* § 20507(a)(3)(B); or "as provided under paragraph (4)," *id.* § 20507(a)(3)(C). Paragraph (4) provides, in turn, that states shall "conduct a

general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" either "the death of the registrant" or "a change in the residence of the registrant." *Id.* § 20507(a)(4). And Section 8(d), *id.* § 20507(d), further limits states' ability to remove voters based on a change in residence. That provision directs that a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant" either (a) "confirms in writing that the registrant has changed residence" or (b) "has failed to respond to a notice" sent by forwardable mail, and has not voted in the two federal general elections following that notice. *Id.*

The statutory text thus provides that, once a state determines that a voter is eligible and places her on the rolls, it can remove her for only four reasons: the registrant's request; criminal conviction or mental incapacity; death; or a change in residence. Noticeably absent from this list is the failure to vote.

Ohio does not defend its "supplemental process" as a means of removing voters due to request, criminal conviction or mental capacity, or death. It defends the process only as a means of removing those who have moved. Ohio Br. 49. See also Jon Husted, Ohio Sec'y of State, Directive No. 2011-15 at 1 (Apr. 18, 2011), https://goo.gl/frd7Pb (stating that the "supplemental process" seeks "to identify electors whose lack of voter initiated activity indicates they may have moved"). But

the text and structure of the NVRA make clear that the failure to vote, even when followed by the Section 8(d)(2) confirmation procedure, is not a "reasonable" means of identifying those individuals who have become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B).

The failure to vote is not a reasonable indication that someone has moved. There are simply too many competing explanations for a citizen's failure to cast a ballot at a particular election. See generally LYN RAGSDALE & JERROLD G. RUSK, THE AMERICAN NONVOTER 114 (2017) (describing many reasons for not voting, including a lack of clear distinctions between candidates, negative views of one or both candidates, and "hardship" that makes it difficult to vote). Nonvoters may conclude that no candidate running in a given election sufficiently represents their views, and thus that they have nothing to vote for. See JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 121-153 (2014). They may conclude that there is little difference between the candidates, so that choosing between them is pointless. See RAGSDALE & RUSK, *supra*, at 105-108. Or they may conclude that the election will not be a competitive one, so their votes are unlikely to matter. See LEIGHLEY & NAGLER, *supra*, at 122-123. Increasingly sophisticated gerrymandering, which often packs members of the minority party into noncompetitive districts, see Richard Holden, *Voting and Elections: New Social Science Perspectives*, 12 ANN. REV. L. SOC. SCI. 255, 259 (2016), exacerbates these problems.

And, for many citizens, the failure to vote may result from barriers imposed by state and local election procedures. Limitations on absentee and early voting, for example, present a particular problem for poor and working-class voters.[2] So do restrictive voter identification laws. See, *e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (*en banc*) (noting district court findings that Texas's voter identification law "disproportionately impacts the poor"), cert. denied, 137 S. Ct. 612 (2017).

It is apparent from the NVRA's legislative history that Congress recognized these problems. The Senate Report explains that, even when states "use the procedure of removal for non-voting merely as an inexpensive method for eliminating persons believed to have moved or died," the result will be to remove "many persons" from the rolls "merely for exercising their right not to vote." Senate Report at 17. The Report noted concerns that such a practice "tends to disproportionately affect persons of low incomes, and blacks and other minorities." *Id.* at 18.

The Ohio process, which begins purge procedures after failure to vote for a mere two years, presents these problems in a particularly extreme form. Under

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[2] Limitations like these have been a particular focus of controversy in Ohio. See, *e.g.*, *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (affirming preliminary injunction against law limiting early voting for nonmilitary voters); *Ohio State Conference of N.A.A.C.P. v. Husted*, No. 2:14-CV-404 (S.D. Ohio, April 17, 2015) (settlement agreement in litigation challenging limitations on early voting hours), https://goo.gl/bJQsUk.

that process, a voter will be subject to the purge procedures if she votes in a presidential election but then fails to vote in the subsequent midterm election. But many citizens vote only in presidential years. See Drew DeSilver, *Voter Turnout Always Drops Off for Midterm Elections, But Why?*, PEW RESEARCH CENTER FACTANK, July 24, 2014, https://goo.gl/84ZHKE. In midterm elections, voters who see no clear ideological differences between the candidates are even more likely to stay home than in presidential elections. See RAGSDALE & RUSK, *supra*, at 108. Midterm falloff is particularly significant for minority voters. See Ronald Brownstein, *The Great Midterm Divide*, THE ATLANTIC, Nov. 2014, https://goo.gl/P3QSBn ("Midterm elections have long attracted fewer voters than elections in presidential years have, with minorities and young people among the groups most likely to stay home."). Especially following the 2008 presidential election – which saw historically high turnout – a failure to vote in the following election does not at all suggest that a voter had moved out of the jurisdiction. See DeSilver, *supra* (noting that in 2008 "57.1% of the voting-age population cast ballots – the highest level in four decades," while "two years later only 36.9% voted in the midterm election").

The unreasonableness of the Ohio process is apparent when compared to the one means specifically listed in the NVRA for identifying voters who have moved. The statute provides that a "State may meet the requirement of subsection (a)(4) by establishing a

program under which" it uses "change-of-address information supplied by the Postal Service" to "identify registrants whose addresses may have changed." 52 U.S.C. § 20507(c)(1)(A). If "it appears from [that] information" that "the registrant has moved to a different residence address not in the same registrar's jurisdiction," the state must then "use[] the notice procedure described in subsection (d)(2) to confirm the change of address." *Id.* § 20507(c)(1)(B)(ii).

Under the procedure laid out in the statute, the purge process is not triggered by voting behavior. Instead, it is triggered by an independent indication that the voter has moved – the voter's listing on the National Change of Address (NCOA) database maintained by the United States Postal Service. Of course, a state is not limited to using the NCOA database. As the Department of Justice has long explained, there are other independent indications of a change in residence on which a state might rely to begin the purge process. See Civil Rights Div., Dep't of Justice, *The National Voter Registration Act of 1993 (NVRA)* at ¶¶ 33-35, https://goo.gl/fMWdc8 ("2010 NVRA Guidance").[3] For example, a state could send "a uniform mailing" to "all voters in a jurisdiction," and then "use information obtained from returned non-deliverable mail" to begin

[3] The Department first issued this guidance in 2010. On August 7, 2017, to accompany the Solicitor General's filing of his brief in this case, the Department amended the language relevant to this case, and deleted the prior language from its website. See U.S. Br. 14 n.4. We cite the 2010 guidance, as it appeared on the Department's website prior to that change; it can currently be found on the Internet Archive's "Wayback Machine."

the confirmation procedure set forth in the statute. *Id.* ¶ 33. A 2009 report by the National Association of Secretaries of State found that 14 states used "nonforwardable address confirmation mailings" in this way. Nat'l Ass'n of Secretaries of State, *Maintenance of State Voter Registration Lists* 6 (Oct. 6, 2009), https://goo.gl/wgjiAC. Or a state could begin the process based on some other "reliable second-hand information indicating a change of address outside of the jurisdiction." 2010 NVRA Guidance ¶ 34. For example, the National Association of Secretaries of State found that five states employ the confirmation process "whenever information received from the state's department of motor vehicles indicates that a registered voter has surrendered their driver's license and obtained a new license in a different state." Nat'l Ass'n of Secretaries of State, *supra*, at 7. And states may rely on other information as well, such as "juror notices," *id.*, or even in-person canvassing, see *id.* at 22, 49, 54.

The mere failure to vote, however, is not a reliable indication that an individual has become "ineligible . . . by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). To the contrary, if a state may begin the purge process simply because a registrant failed to vote, there is a substantial risk that the result will be to penalize the exercise of a protected right to refrain from voting. That is not a fair reading of the NVRA's text, which requires states to make a "reasonable effort" to identify those voters who are no

longer eligible – not those who have simply declined to vote. 52 U.S.C. § 20507(a)(4).[4]

C. Under the Failure-to-Vote Clauses in the NVRA and HAVA, States May Not Use the Failure to Vote to Initiate a Voter-Purge Process

1. Ohio argues that its "Supplemental Process" is consistent with the failure-to-vote clause in the NVRA. Ohio Br. 19-35. As originally enacted, that clause provided that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll * * * shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." Pub. L. No. 103-31 § 8(b)(2), 107 Stat. 77, 87 (1993).

But a problem immediately arose in interpreting that clause. A separate provision of the statute, Section 8(d), mandates that states use the confirmation procedure before removing a voter based on change

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[4] Departing from the position the government took below, see U.S. CA6 Br. 18-20, the Solicitor General argues that Section 8(a)(4) "should not be read as" imposing limitations on states, because it uses the phrase "reasonable efforts." U.S. Br. 28. But whatever "latitude" that subsection provides to states, cf. *id.*, Sections 8(a)(3) and 8(a)(4) together plainly prohibit using un-"reasonable" means to identify voters who have moved. As we show in text, and as the government argued below, Ohio's "supplemental process" violates that prohibition.

in residence. See 52 U.S.C. § 20507(d). Under that procedure, unless the voter confirms in writing that she no longer lives in the jurisdiction, the immediate reason the state will remove her from the rolls will be her failure to vote. See U.S. Br. 19 n.5 (conceding that "[t]he registrants' failure to vote after receipt of the notice could fairly be deemed a proximate cause of their removal – indeed, it is the most immediate cause"). Controversy quickly developed regarding how to reconcile that confirmation procedure with the failure-to-vote clause. In one of the first cases litigated under the statute, California proposed to send a nonforwardable residency confirmation postcard to all registrants who had not voted within the past six months. For any registrant for whom that postcard was returned as undeliverable, the state would begin Section 8(d)'s two-election-cycle mail-notice procedure. See *Wilson v. United States*, No. C 95-20042 at 5 (N.D. Cal. Nov. 2, 1995), as modified by Joint Stipulation to Substitute Language (N.D. Cal. Nov. 13, 1995). Private plaintiffs and the United States argued that California's proposal violated the failure-to-vote clause, but the court disagreed. Because the state did not initiate the Section 8(d) procedure until the postcard was returned as undeliverable – an action that gave the state an independent indication that the voter had moved – the court concluded that California's proposal complied with the NVRA. See *id.* at 5-6.

When it enacted the Help America Vote Act in 2002, Congress resolved any controversy by making clear that Section 8(b)(2)'s failure-to-vote clause does

not bar Section 8(d)'s confirmation procedure. HAVA added the following language to the end of NVRA Section 8(b)(2):

> except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual –
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> **(A)** has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> **(B)** has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

52 U.S.C. § 20507(b)(2). HAVA also added a separate, stand-alone provision that required states to adopt a "system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(A). That provision included its own, parallel failure-to-vote clause. Congress directed that, "consistent with the National Voter Registration Act of 1993, registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Id.* (citation omitted).

2. Ohio and the Solicitor General contend that these provisions authorize the "Supplemental Process." Because no registrant is struck from the rolls unless she has *both* failed to respond to the mail notice *and* failed to vote, the state argues that the failure to vote is not the "sole proximate cause" of the registrant's removal. Ohio Br. 24-25. That is true, the Solicitor General argues, even though failures to vote serve as both the trigger that sets the purge process in motion and the final step that leads to the removal of a voter from the rolls. See U.S. Br. 16-17. That argument fails for two reasons.

a. First, Ohio's argument misses the point. The HAVA amendments clarified that a state does not violate the failure-to-vote clause merely by using the Section 8(d) procedure to confirm that a registrant has moved. They "made a conclusion clear that might otherwise have been fought over in litigation," *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 87 (2002), and thus, contrary to the Solicitor General's insinuation, had a "practical effect." U.S. Br. 22. Cf. Ohio Br. 41 (arguing that its interpretation is necessary to prevent the HAVA amendments from being "meaningless") (internal quotation marks omitted). But they did not at all change the underlying rule, in Section 8(a) of the NVRA, that the state must use a reasonable means of identifying registrants to whom to send the confirmation notice in the first place. As we showed above, Section 8(a) requires states to have reliable independent information suggesting that the registrant has

moved out of the jurisdiction before commencing the mail-notice process. See Part I.B., *supra*.

Indeed, the NVRA's text makes clear that the mail-notice process is, as Ohio acknowledges, a "Confirmation Procedure," Ohio Br. 7-8 – a process designed to *corroborate* some *independent* indication that the registrant is no longer eligible. See Black's Law Dictionary (10th ed. 2014) (definition of "confirm" is "verify" or "corroborate"). Thus, Section 8(c) provides that when a state uses the NCOA procedure to identify voters who have moved, it must then "use[] the notice procedure described in subsection (d)(2) to *confirm* the change of address." 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added). And Section 8(d) provides that in all cases a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant" either "*confirms* in writing that the registrant has changed residence" or fails to respond to the mail notice. *Id.* § 20507(d)(1) (emphasis added).

When a state initiates the Section 8(d) process based solely on a failure to vote, the process cannot *confirm* the registrant's change of address, because that failure may indicate nothing more than that the registrant has exercised the protected right not to vote. See Parts I.A. & B., *supra*. A voter's lack of response to the notice, too, does not indicate that she has moved out of the jurisdiction. The voter may have failed to see the notice, thought it was junk mail, or intended to return the card but been unable to follow through in the

press of daily life. If the process began with some reliable evidence that a registrant had moved – such as the individual's inclusion on the NCOA database, or the return of mail as undeliverable to her address on file – the subsequent failure to return a card or to vote might lead a reasonable person to conclude that the registrant had, in fact, left the jurisdiction. Absent any such evidence, the failure to vote or return the card is too readily explained on too many alternative grounds. It thus cannot "confirm" that the registrant is no longer eligible to vote.

Neither HAVA's amendment to the NVRA's failure-to-vote clause, nor its stand-alone file-maintenance provision, suggests that a state may employ the mail-notice process *without* first having reliable independent information that a registrant is no longer eligible. The amendment to the failure-to-vote provision specifically allows the state to employ "the procedures described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2) – procedures that, as we have shown, are expressly designed to *confirm* prior indications that a registrant has moved. And the stand-alone file-maintenance provision requires that a state's efforts to remove ineligible voters must be "consistent with the National Voter Registration Act." 52 U.S.C. § 21083(a)(4)(A). See also *id.* § 21083(a)(2)(A)(i) (providing that "[i]f an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993"). It thus does not grant states any latitude that the NVRA denies them.

Indeed, HAVA provides that, except for a specific provision relating to identification requirements for first-time voters who registered by mail, "nothing in [the statute] may be construed to authorize or require conduct prohibited under" the NVRA. 52 U.S.C. § 21145(a)(4).

b. Second, Ohio's interpretation denies independent force to the NVRA's failure-to-vote clause, and to the parallel language in HAVA's stand-alone file-maintenance provision. A "failure to respond to a notice," the state contends, "breaks th[e] required causal connection between nonvoting and removal." Ohio Br. 19. Under that argument, it is impossible to violate the failure-to-vote clause, and the parallel HAVA provision, so long as a state conducts the mail-notice procedure before ultimately removing a registrant from the rolls. And that is true even if a registrant's failure to vote is the proximate or even sole reason why the state initiates the purge process. If Ohio's interpretation were right, there would be no need for Section 8(b)(2)'s failure-to-vote clause, because Sections 8(c) and (d) of the NVRA already require states to conduct the mail-notice procedure before removing registrants from the rolls.

In its brief on the merits, Ohio tries to suggest some daylight between the provisions. Because Sections 8(c) and (d) specifically address removal of voters based on a *change in residence*, the state says that the failure-to-vote clause has the independent effect of barring states from using nonvoting – at least absent the confirmation process – to determine that a registrant

has *died*. Ohio Br. 34. But states do not use nonvoting to determine that a registrant has died. They have much more authoritative ways of making that determination. See Nat'l Ass'n of Secretaries of State, *supra*, at 9 ("In most states, information on deceased voters is received from a state office of vital statistics, the state department of health, or a similar entity. Additionally, a number of states permit election officials to remove a deceased voter from sources such as obituary notices, copies of death certificates, and notification from close relatives."). It is implausible that Congress would have included the failure-to-vote clause to address removals due to death.

Ohio also asserts that Congress used different language to describe the voters covered by Section 8(b)'s failure-to-vote clause and Section 8(d)'s requirement to use the mail-notice procedure. See Ohio Br. 34-35 (arguing that Section 8(d) applies only to "registrants," while Section 8(b) applies to "any person"). That difference, it avers, suggests that Section 8(d)'s confirmation procedure applies only when a state seeks to remove voters who have become ineligible *after* they registered to vote, while "the Failure-To-Vote Clause applies even to state programs or activities designed to uncover persons who were wrongly added to the rolls as an initial matter." Ohio Br. 35.

Ohio's argument founders on a basic problem: The language Congress used to describe the reach of Section 8(b) is essentially identical to the language it used to describe the reach of Section 8(d). Compare 52 U.S.C. § 20507(b)(2) (covering "the removal of the name of any

person from the official list of voters registered to vote"), with *id.* § 20507(d)(1) (covering the removal "of a registrant from the official list of eligible voters"). And in HAVA's stand-alone file-maintenance provision, the mail-notice clause and the failure-to-vote clause use exactly the same language to describe the individuals they cover. See 52 U.S.C. § 21083(a)(4)(A) (stating that "*registrants* who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no *registrant* may be removed solely by reason of a failure to vote") (emphasis added). Ohio's interpretation rests on a strained effort to find a distinction between the language of NVRA Section 8(b) and 8(d), and it denies independent force to the failure-to-vote clause in HAVA's file-maintenance provision.

3. If the failure-to-vote clauses in the NVRA and HAVA mean anything, they must mean that a state may not use nonvoting as a basis for initiating the mail-notice purge process. Although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from *deriving* its belief that she has changed her residence based on nonvoting. If a registrant's failure to vote before the mailing of the notice is the reason the state *begins* the mail-notice process, and the failure to vote after not returning the card is, as the Solicitor General concedes, "the most immediate cause" of the registrant's removal from the rolls at

the *end* of the process, U.S. Br. 19 n.5, the state's action plainly "result[s] in the removal" of that registrant "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

Contrary to Ohio's suggestion, Ohio Br. 19, 24-25, the registrant's failure to return the card sent with the notice is not an independent, intervening cause. The state, after all, waits a full two federal election cycles after sending that notice before removing the voter from the rolls. The failure to vote – which is the reason the state sends the notice in the first place, and which must continue for a four-year period afterwards – is the proximate cause of the registrant's removal. The removal thus violates the NVRA's failure-to-vote clause.

Nor can the state find shelter in the "solely by reason of" language of *HAVA*'s failure-to-vote clause. 52 U.S.C. § 21083(a)(4)(A). The state suggests that if there is *any* other fact that led a voter to be removed from the rolls – such as not returning a card – then the failure to vote cannot have been the "sole[]" reason for the removal. Ohio Br. 39. That is an implausible reading of the statutory text. As an analytic matter, there is never a *single* but-for cause for anything. This Court has thus read statutory "sole cause" language in a more practical way, as imposing a requirement of proximate cause. For example, in *F.C.C. v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), the Court considered the meaning of a statute that barred the FCC from revoking the license of a debtor "'solely because'" the

debtor had not paid a debt dischargeable in bankruptcy. *Id.* at 300 (quoting 11 U.S.C. § 525(a)). The FCC agreed that the proximate reason it cancelled the debtor's license was the failure to pay a debt, but it argued that it had a "valid regulatory motive" for the cancellation; that motive, it contended, meant that the failure to pay the debt was not the "sole[]" reason for its action. *Id.* at 301. In an opinion by Justice Scalia, the Court rejected that argument. The sole-cause language, the Court held, "means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation – the act or event that triggers the agency's decision to cancel." *Id.*

So too here. The failure to vote is what triggers Ohio's "supplemental process," and it is the final proximate step before the state removes a registrant under that process. The process thus violates the failure-to-vote clauses in both the NVRA and HAVA. And even if those clauses were not alone sufficient to establish the unlawfulness of Ohio's process, they would nonetheless bolster the conclusion that the process violates Section 8(a) of the NVRA, because it is not a "reasonable effort" to identify voters who are ineligible due to a change in residence.

D. Principles of Constitutional Avoidance, if Anything, Argue Against Ohio's Construction of the NVRA

Ohio argues that its interpretation of the NVRA is supported by the canon of constitutional avoidance. Ohio Br. 46-53. Ohio contends, principally, that barring the use of nonvoting as a basis for beginning a purge process will improperly encroach on the state's power to make residency a qualification for voting. *Id.* at 49-51. That argument is unpersuasive. States have ample means of obtaining information about residency even without relying on the failure to vote. As we have shown, states can use the Postal Service's NCOA database, send registrants a nonforwardable mailing, or rely on other reliable information. See pp. 15-17, *supra*. Because "the statute provides another means by which [the state] may obtain information needed for enforcement," *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013), there is no serious constitutional question that implicates the avoidance canon.

Ohio invokes the avoidance canon for two other reasons: First, the state argues that voter registration might itself be a "qualification" that Congress may not regulate under the Elections Clause, U.S. Const. Art. I, § 4. Ohio Br. 51-53. Second, the NVRA regulates how states administer presidential elections, a matter Ohio argues might fall outside of congressional power. Ohio Br. 53. But there is no serious constitutional question here. This Court has long explained that the Elections

Clause power extends to registration,[5] and that Congress has authority to regulate the procedures used in presidential elections.[6]

In any event, these latter arguments misunderstand what the avoidance canon does. That canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Even if regulating voter registration or regulating the administration of presidential elections *did* raise serious constitutional questions, there is no plausible interpretation of the NVRA's text that would avoid them. By its plain text, the statute extensively regulates voter registration (a fact evident from its title, the National Voter *Registration* Act). And it also plainly covers presidential elections. See 52 U.S.C. § 20502(2) (incorporating by reference 52 U.S.C. § 30101(3)). Any constitutional questions regarding *those* aspects of the statute thus provide no basis for invoking the avoidance canon. See *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (canon " 'has no application in the absence of . . .

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[5] See, *e.g.*, *Cook v. Gralike*, 531 U.S. 510, 523-524 (2001) ("manner" of holding elections under Article I, Section 4 "encompasses matters like 'notices, *registration*, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.' ") (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932); emphasis added).

[6] See *Burroughs v. United States*, 290 U.S. 534, 544 (1924).

ambiguity' ") (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001)).

If anything, constitutional avoidance concerns counsel *against* the interpretation Ohio places on the NVRA. If the state's reading is correct, Congress has, pursuant to its Article I, Section 4 power to "make or alter" election regulations, authorized states to remove citizens from the rolls simply for exercising their protected right not to vote. See Part I.A., *supra*. That interpretation would itself raise serious constitutional questions. Fortunately, the reading of the NVRA that avoids those questions is also the best interpretation: The statute bars states from initiating a purge process based on a registrant's failure to vote. See Parts I.B.-C., *supra*.

II. From 1994 Until the Solicitor General's Brief in This Case, the Department of Justice Repeatedly Interpreted the NVRA to Prohibit Using the Failure to Vote as the Basis for Initiating a Purge Procedure

In the Sixth Circuit, the United States contended, consistent with the argument we have presented in this brief, that Ohio's "supplemental process" violates the NVRA. See U.S. CA6 Br. 11-30. That argument is also consistent with the Department of Justice's longstanding interpretation of the NVRA, under which a state may not initiate a purge process based merely on the failure to vote. The Department first articulated

that interpretation shortly after the statute's enactment. Until the Solicitor General's brief in this Court, the Department had repeatedly reaffirmed that interpretation – both before and after HAVA became law – in a variety of fora.

Congress enacted the NVRA in 1993. The next year, Georgia amended its voter registration practices. Under those new practices, registrants "who fail[ed] to vote (or otherwise have 'contact' with the election administration system) during a three-year period would be specifically targeted to be included in the state's purge procedures." Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., to Dennis R. Dunn, Senior Assistant Attorney General, State of Georgia, at 2 (Oct. 24, 1994) ("Georgia Preclearance Objection"). When the state sought preclearance under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, the Department of Justice objected. Then-Assistant Attorney General Patrick explained that the state's reliance on nonvoting as the trigger for a purge process was "directly contrary to the language and purpose of the NVRA" and was "likely to have a disproportionate adverse effect on minority voters in the state." Georgia Preclearance Objection, *supra*, at 2.

The Department subsequently reiterated this position in litigation. In 1995, Pennsylvania adopted legislation under which election officials would initiate the mail-notice purge process for any registrant who had not voted in the previous five years. The Department argued that Pennsylvania's law violated the NVRA. See Memorandum in Support of Motion for

Summary Judgment at 14-18, *United States v. Pennsylvania*, No. 95-CV-382 (E.D. Pa., filed Aug. 7, 1996). It explained that the law improperly removed voters from the rolls by reason of their failure to vote: "a voter gets a notice for failing to vote, and it is for failing to vote in the ensuing period after the notice is sent, that a registrant is then stricken from the rolls." *Id.* at 16.

The Department took the same position when California sought to adopt a new voter-purge procedure. Recall that in 1995, the district court in *Wilson*, *supra*, had upheld a procedure in which the Section 8(d) mail-notice process was triggered by the return of a residency-confirmation postcard as undeliverable. In 1996, the state sought to abandon that regime in favor of one in which the simple failure to vote for four years initiated the Section 8(d) process. The Department argued that the proposed procedure violated the NVRA because it would function "as a purge for nonvoting." United States' Memorandum in Support of Motion for Further Relief at 9, *Wilson v. United States*, No. C-95-20042 JW (N.D. Cal., filed Oct. 23, 1997).[7]

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[7] Also in 1997, the Acting Assistant Attorney General for Civil Rights notified the States of Alaska and South Dakota that she had authorized lawsuits against them for violating the NVRA by using nonvoting as a basis for initiating the purge process. See Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Div., to Bruce M. Botelho, Attorney General, State of Alaska (Feb. 11, 1997); Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Div., to Mark Barnett, Attorney General, State of South Dakota (Feb. 11, 1997).

After HAVA's enactment, the Department negotiated a series of settlement agreements that incorporated the same interpretation of the NVRA. In *United States v. Pulaski County*, No. 4-04-CV-389 SWW (E.D. Ark., entered Apr. 19, 2004), the Department entered into a consent decree that permitted the defendants to initiate Section 8(d)'s confirmation process only for those "active voters for whom there is reason to believe there has been a change of address"; the decree did not identify the failure to vote as such a reason. *Id.*, Consent Decree ¶ 5. In *United States v. Indiana*, No. 1:06-cv-1000-RLY-TAB (S.D. Ind., entered June 27, 2006), the Department entered into a consent decree that directed the state to send Section 8(d) confirmation notices to those voters for whom prior mailings had been "returned as undeliverable with no forwarding address or a forwarding address outside the registrar's jurisdiction." *Id.*, Consent Decree and Order ¶ 2. The decree noted that the state might also infer that voters had become ineligible, and thus initiate the mail-notice procedure, based on "specific information provided in writing that calls into question those voters' continued eligibility to vote at their currently registered addresses, such as jury declinations or county or state tax filings which claim non-resident status." *Id.* ¶ 4. But the decree did not list nonvoting as a permitted basis for initiating the purge process. Contrary to the suggestion made by the group of former Department of Justice attorneys who filed in support of the state, see Former Civ. Rts. Div. Attys. Br. 14, the *Pulaski County* and *Indiana* decrees did not permit the defendants to

initiate a purge process based on nonvoting. Indeed, they barred such a practice.[8]

And in a decree in *United States v. Cibola County*, No. CIV-93-1134-LH/LFG (D.N.M., entered Jan. 31, 2007), the Department stated its position especially clearly. The decree provided:

> The County shall not place the name of any voter on the inactive list or otherwise remove the voter's name from the official voter registration list solely by reason of the person's failure to vote. The County shall only place the name of any voter on an inactive list based on *objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address or National Change of Address program data showing a move outside the County*.

Id., Amended Joint Stipulation ¶ 13 (emphasis added). That language plainly barred the defendant election officials from using the failure to vote as a basis for initiating the NVRA's mail-notice confirmation procedure.

One sub-provision of a settlement agreement the Department also entered in 2007, when read out of context, might seem to suggest a contrary position. See Settlement Agreement ¶ 16(5), *United States v. City of*

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[8] Notably, the Solicitor General does not endorse the suggestion that the government's current position is consistent with the *Pulaski County* and *Indiana* consent decrees. See U.S. Br. 14 n.3.

Philadelphia, No. 06-4592 (E.D. Pa., entered Apr. 26, 2007) (stating that it was to "be the policy of the [Philadelphia County Board of Elections]" to "send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner"). On closer examination, however, that sub-provision does not undermine the Department's longstanding interpretation of the NVRA. The *Philadelphia* case, as filed, was principally about providing language assistance to Spanish-speaking voters, not about voter-purge procedures. See *id.* at 1-2 (recitals). And it is doubtful that the sub-provision addressing confirmation notices, which was framed in terms of the Board's "policy" rather than as a direct mandate, was even enforceable. Even taking it for everything it is worth, that single sub-provision, which formed a small part of a larger settlement agreement, is an outlier. It is inconsistent with the interpretation and practice of the Department both before and since.

In 2010, the Department issued extensive guidance regarding the application of the NVRA. See 2010 NVRA Guidance, *supra*. Reaffirming the longstanding position described above, the guidance explained that the statute barred states from initiating the mail-notice purge process without "reliable second-hand information indicating a change of address outside of the jurisdiction from a source such as the NCOA program, or a general mailing to all voters." *Id.* ¶ 34. The Department relied on its longstanding interpretation, and on the 2010 guidance, when it argued below that Ohio's

"supplemental process" violates the NVRA. See U.S. CA6 Br. 2-3. See also Statement of Interest of the United States, *Common Cause v. Georgia*, No. 1:16-cv-452-TCB (N.D. Ga., filed May 4, 2016) (taking the same position in a challenge to a Georgia purge practice).

From 1994 until the Solicitor General's brief in this case, the Department of Justice had repeatedly interpreted the NVRA to prohibit a state from using a registrant's failure to vote as the basis for initiating the Section 8(d) voter-purge process. As we showed in Part I, *supra*, the Department's longstanding interpretation was correct. Ohio's "supplemental process" violates the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD AND BRIEFS.

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IN THE
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,
v.
A. PHILIP RANDOLPH INSTITUTE NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance. Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Judicial Watch has a major and particular interest in the issues at stake in this litigation, deriving from its own prior NVRA litigation against Ohio. Judicial Watch filed a federal lawsuit under Section 8 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507, in 2012 against Ohio Secretary of State Jon Husted.[2] In that complaint, Judicial Watch alleged that Ohio had been failing to make a reasonable effort to maintain the accuracy and currency of its voter rolls in violation of the NVRA. *Id.* at 25. Judicial Watch argued that its members were injured due to Ohio's alleged failure to maintain accurate voter rolls.

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in this case.

[2] *Judicial Watch, Inc. and True the Vote v. Husted*, Civil Action No. 2:12-cv-792 (S.D. Oh.).

Specifically, Judicial Watch alleged that Ohio's violations undermined Judicial Watch members' confidence in the legitimacy of Ohio elections, causing them to doubt whether their votes would be cancelled out by votes cast in the name of outdated registrations, thereby discouraging them from voting. *Id.* at 32-33.

Judicial Watch litigated its case against Ohio for over sixteen months. Judicial Watch attorneys spent over 400 hours trying the case, incurring significant unrecovered legal fees in addition to out-of-pocket litigation expenses, including expert fees, local counsel fees, court costs, deposition costs, and travel costs. In January of 2014 the parties settled the lawsuit, agreeing to terms for Ohio to perform certain NVRA Section 8 list maintenance practices through November 2018.[3] A key provision of this Settlement Agreement was Ohio's promise to perform an annual list maintenance "Supplemental Mailing" to voters who had no contact with Ohio's election offices for two years.[4] The Settlement Agreement required Ohio to send the Supplemental Mailing every year, whereas Ohio had previously been sending the mailing every *two* years. The Supplemental Mailing portion of the Settlement Agreement was so important to the parties that they subsequently negotiated an

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[3] Settlement Agreement, January 10, 2014, *available at* https://goo.gl/cVuxmi; *see Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. B at 39, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), Dkt. No. 37 (Settlement Agreement; First Amendment to Settlement Agreement).

[4] *Id.* at 41.

amendment solely to give Ohio greater flexibility over which month of the year to initiate the Supplemental Mailing. *Id.* at 44.

Judicial Watch never would have agreed to the Settlement Agreement with Ohio and dismissed its lawsuit if it believed that the Supplemental Mailing was legally impermissible. If the Sixth Circuit's ruling in this case is allowed to stand, this key provision of Judicial Watch's Settlement Agreement could be voided. This would undermine Judicial Watch's extensive efforts to protect the integrity of elections for its Ohio members. Judicial Watch therefore has a significant interest in the subject matter of this litigation, along with a genuine organizational interest in protecting its members' voting rights and ensuring that its past efforts have not been wasted.

Judicial Watch also has an institutional interest in the cause of election integrity. This interest is shared with the people of all states whose electoral laws have been put in question by the Sixth Circuit's flawed decision. In this case in particular, if Ohio's voter rolls are not maintained in a current and accurate condition consistent with the NVRA, Ohio citizens could have their votes diluted or cancelled out by unlawful ballots cast in the names of outdated or duplicate registrations. Public confidence in the integrity of the electoral process is an important interest, shared in this case by the State and people of Ohio as well as by Judicial Watch. *See Judicial Watch v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) ("If the state has a legitimate interest in

preventing that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm.").

SUMMARY OF ARGUMENT

The structure of Section 8 of the National Voter Registration Act of 1993 (NVRA) makes it clear that states are assigned the primary responsibility for ensuring that their voter rolls contain only eligible voters. 52 U.S.C. § 20507. The statute gives states considerable discretion to determine what measures will constitute the reasonable efforts necessary to comply with Section 8. In particular, the NVRA says nothing about what sorts of events would warrant the sending of a statutorily prescribed notice to a voter who is believed to have moved elsewhere. A 2002 amendment to Section 8, moreover, clarified that the statute's restriction on removing a voter for failing to vote did *not* apply to removals under the subsection dealing with that statutory notice.

In enjoining Ohio's Supplemental Process, the Sixth Circuit's 2-1 ruling misapplied principles of statutory construction in a way that inverted the plain meaning of Section 8. The Sixth Circuit contended that reading the 2002 amendment to create an exception for state procedures like Ohio's Supplemental Process would render the language of that amendment superfluous. In fact, the 2002 amendment merely clarifies what had been an apparent conflict in the NVRA, whereby Sections 8(b) and 8(d) seemed to say different things about whether a voter could be removed for failing to vote. The Sixth

Circuit's argument also ignored the meaning supplied by the structure of the entire statute, which indicates that states are free to send confirmation notices on any nondiscriminatory and uniform basis.

As it exists, Ohio's Supplemental Process allows the sending of a statutory confirmation notice to any registrant who has not had any voting-related activity for two years. After that, the registrant may be removed from the rolls if there is no response or further activity for two general federal elections. The Sixth Circuit further erred by holding that this sequence of events amounts to removing a voter *for* failing to vote. To the contrary, the failure to vote only leads to the sending of a notice. Subsequent removal is due to the failure to respond to that notice for a period of time that may extend up to four years. The Sixth Circuit's attempt to argue otherwise relies on a misuse of the plain language of the NVRA.

Congress, the Justice Department, and nineteen states all have concluded that using the failure to vote as a basis for sending confirmation notices or taking other actions to remove voters is fully consistent with the NVRA. The Sixth Circuit's decision affects the interests of the voters and government of the State of Ohio; Judicial Watch, which has an NVRA-related Settlement Agreement with the State; other states whose electoral laws are now in peril; and the people of the United States, who grow ever more jaded about the integrity of their electoral system. The Sixth Circuit's error should be rectified by the Court.

ARGUMENT

I. The Sixth Circuit's Interpretation of the NVRA is Counter-Textual.

A. The Plain Language of the NVRA Allows States to Decide How to Conduct List Maintenance and When to Send a Registrant a Confirmation Notice.

Section 8, the "integrity" provision of the NVRA, requires states to maintain accurate voter rolls. 52 U.S.C. § 20507; *see* 52 U.S.C. § 20501(b)(3) and (4) (NVRA's stated purposes include "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter rolls are maintained."); S. REP. NO. 103-6, at 17-18 (1993) (extolling "accurate and up-to-date voter registration lists").

The core requirement of Section 8 is the mandate that "each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." *Id.*, § 20507(a)(4). This provision does not list any particular steps that a "general program" must incorporate, or specify exactly how a state should go about complying. Rather, by its plain language, it only requires that states make a "reasonable effort." The precise meaning of this clause is subject to interpretation by state legislatures and, ultimately, by federal courts. *See United States v. Missouri*, 2007 U.S. Dist. LEXIS 27640 at *19, 2007 WL 1115204 (W.D. Mo. 2007), *aff'd in part, rev'd in part on other grds.*, 535 F.3d 844 (8th Cir. 2008) ("The NVRA does

not define 'reasonable effort' and the Court has found no authority that describes the parameter of the terms.").

The rest of Section 8 makes sense in the context of the fact that the statute does not describe what a state must do to comply. Accordingly, Section 8(b) provides that, whatever else such an effort might entail, it must meet certain baseline requirements. First, a state's effort must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). And second, it must not remove a person from the voter rolls "by reason of the person's failure to vote." *Id.*, § 20507(b)(2). In 2002, that provision was modified to add that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections [8](c) and [8](d)" to remove ineligible voters from the rolls.

Section 8(c), again implicitly recognizing the indeterminate nature of NVRA compliance, provides that states "may" meet their list maintenance obligations by using "change-of-address information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A). Finally, Section 8(d) provides that, unless they confirm in writing that they have moved, registrants may not be removed from the rolls for changing addresses unless they fail to respond to a statutory notice (the "confirmation notice") *and* fail to vote during the time period defined by the next two general federal elections. *Id.*, § 20507(d)(1), (d)(2).

Subject to the foregoing restraints, the NVRA allows states wide latitude in designing a "general program that makes a reasonable effort" to remove ineligible registrants from the rolls. 52 U.S.C. § 20507(a)(4). Of particular relevance here is the fact that *the NVRA says nothing about the kinds of events that states may rely on as grounds for sending confirmation notices to those who are believed to have moved.* All that the NVRA requires is that a confirmation notice must be sent prior to the commencement of the statutory waiting period of two general federal elections. *Id.*, § 20507(d)(1)(B)(ii). There is simply no basis for reading any other requirements into the statute. *See Ill. Pub. Telcoms. Ass'n v. FCC*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) ("we will not read into the statute a mandatory provision that Congress declined to supply"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) (omitted-case canon); *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation.") (citation omitted); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.") (citations omitted); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citations omitted).

Accordingly, the NVRA would not prevent Ohio from sending confirmation notices every year to every registrant in the State, although this undoubtedly would be quite expensive. It is equally clear that the NVRA would not prohibit Ohio from sending

confirmation notices on a "uniform" and "nondiscriminatory" basis to any meaningful subset of the foregoing, for example, to residents who have ceased filing state tax returns, which may suggest that they have moved. In the same vein, nothing in the NVRA prohibits Ohio from sending a confirmation notice to all registered voters who have not engaged in any voter activity in the preceding two years, per the State's "Supplemental Process." The State's leeway to do so is fully consistent with the design of the NVRA, which generally accords states a great deal of freedom in crafting their list maintenance programs. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) ("the plain meaning of [a] statute" depends on "the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citations omitted).

Finally, the conclusion that Ohio may use any reasonable basis to trigger the sending of confirmation notices is only made more compelling by the 2002 amendment to the NVRA. That amendment made it clear that the bar contained in Section 8(b) on any removal from the rolls "by reason of [a] person's failure to vote" did *not* apply to a removal for failing to respond to a confirmation notice. *Id.*, § 20507(b)(2).

B. The Sixth Circuit's Ruling Disregards the Plain Meaning of Section 8 of the NVRA.

In holding that the NVRA proscribes Ohio's Supplemental process, the Sixth Circuit misapplied canons of statutory construction and ultimately

mandated an outcome that disregards, and even is contrary to, the plain meaning of Section 8.

The Sixth Circuit was first compelled to explain the 2002 amendment to the NVRA. This amendment qualified Section 8's proviso that no one could be removed from the voter rolls "by reason of [their] failure to vote," by adding that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in," *inter alia*, Section 8(d), to remove a voter from the rolls. 52 U.S.C. § 20507(b)(2). In other words, Section 8(b)(2) was amended precisely in order to make clear that state procedures – like Ohio's Supplemental Process – that involved sending Section 8(d) confirmation notices were *not* proscribed by that paragraph's other restriction on removals for failure to vote. This amendment seems to bar the very arguments made by Respondents below and accepted by the Sixth Circuit.

In response to this point, the Sixth Circuit contended that reading Section 8(b)(2)'s exception as a "mere reiteration" of Section 8(d)(1) would make the exception superfluous, contrary to accepted canons of statutory construction. App. 18a. Accordingly, the Sixth Circuit concluded that the amendment must have been intended to apply the prohibition it contained to all statutes. App. 20a. By this reasoning, the 2002 amendment was seen to specially refer to – rather than to specially except – statutes like Ohio's Supplemental Process.

In the course of its reasoning, the Sixth Circuit misapplied the statutory canon regarding superfluous language. Prior to its amendment, the NVRA merely provided that no person may be removed from the rolls "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). However, two subsections down from that clause, the NVRA provided that a person who has changed residence and who has failed to respond to a confirmation notice may be removed if he or she "has not voted or appeared to vote . . . in an election during the period beginning on the date of the notice and ending after the date of the second general Federal election." *Id.*, § 20507(d)(1)(B)(ii).

These provisions appear openly to conflict. Perhaps a reviewing court would have found the proper way to reconcile these provisions using appropriate canons of statutory construction. In any event, the 2002 amendment removed all doubt, resolving the conflict by clarifying that Section 8(b) did not bar the use of Section 8(d) to remove ineligible registrants. Statutory language that clarifies a provision is not superfluous. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("The phrase 'any other person' performs a significant function simply by clarifying that subparagraph (B) excludes the persons enumerated in subparagraph (A)."). The Court in *Atlantic Research Corp.* also issued a pertinent warning, when it observed that "our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire

provision a nullity." *Id.* The Sixth Circuit has adopted just such a "dubious construction," insisting that language plainly intended to exempt the use of confirmation notices was actually meant to include and refer to them.

The Sixth Circuit's next innovation is even more misguided. After determining that Section 8(b)(2) did not contain an exception for procedures like the Supplemental Process, the Court asked whether that process "result[s] in the removal" of voters for failing to vote. App. 21a (internal citation and quotation omitted). In finding that it does, the Sixth Circuit defined "result" as strict, but-for causation, however attenuated. *Id.*

That interpretation is not consistent, however, with the "ordinary meaning" of the words of the statute. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (citations and internal quotations omitted). In ordinary language, when it is said that one event is the "result" of another, the initiating event is usually the one closest in time to the caused event. To put it more concretely, it ordinarily would be said that the Supplemental Process "resulted in" a confirmation notice being sent. In turn, the failure to respond to that confirmation notice, along with the passage of time until the second general federal election, "resulted in" a registrant being removed from the rolls. No one in ordinary speech uses the terms "result" or "cause" or "consequence" to refer back indiscriminately and equally to all prior causes, however remote, in a causal chain. Ordinary speech limits the reference by a sense of nearness.

Lawyers have a word for this. "The term 'proximate cause' is 'shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.'" *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment) (citation omitted). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Id.* (citation omitted). Applying this principle here, the proximate cause of the removal of voters under the Supplemental Process is their failure to respond to a confirmation notice, along with the passage of a statutory period of time. Registrants are *not* removed for failing to vote.

To reach the conclusions that it did, the Sixth Circuit majority engaged in a needlessly convoluted analysis of the language of Section 8. Circuit Judge Siler, who dissented from the majority's approach to the NVRA, had it right when he observed that "[t]his seems to be a much simpler process than as outlined in the majority opinion." App. 33a.

> The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four

> consecutive years, including two consecutive Federal elections following that notice.

App. 34a.

C. Legislative History, the Federal Government's Record of Enforcement, and States' Interpretations of the NVRA All Confirm That Ohio's Process Is Valid.

Because the plain language of the NVRA resolves the issue in this case, it is not necessary to review the legislative history. *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete," except in "rare and exceptional circumstances.") (citation and internal quotations omitted). However, even if the statute were determined to be ambiguous, the legislative history of the NVRA shows that failing to vote is a permissible basis for sending a confirmation notice.

In surveying the then-current state voter registration practices, the Senate and House reports accompanying the Act observed:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead *target only those who did not vote in the most recent election* (using not voting as

> an indication that an individual might have moved). *Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under* [the NVRA].

S. REP. NO. 103-6, at 46; H.R. REP. NO. 103-9, at 30 (emphasis added). The meaning of this passage is evident. It was only the "handful of states" that "drop non-voters from the list without notice" that would have to change their practices to comply with the new law. The states referred to in the immediately preceding sentence, who "target only those who did not vote in the most recent election," were *not* identified as among the states who would have to change their procedures. This means that the authors of these reports did not believe that using the failure to vote as a reason to contact voters was proscribed by the NVRA.

The way the Department of Justice has enforced the NVRA shows that it shares this understanding. In 2007, the Department settled a lawsuit it had filed against the City of Philadelphia under the NVRA and other statutes. In the agreement resolving that case, the Department required Philadelphia to "send a forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner . . ." and that it "place voters who do not respond to the confirmation notice in an inactive status." Settlement Agreement at 10, ¶ 16(5) & (6), *United States v. Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26,

2007).[5] If those voters failed to vote in the subsequent two federal general elections, Philadelphia was to remove them from the registration list. *Id.* In other words, the Department *commanded* Philadelphia to do what Appellants now say Ohio is *forbidden* to do. In fact, the Department's "trigger" for a confirmation notice in Philadelphia was a failure to vote in any election, which is a stricter standard than Ohio's two-year period.

States interpreting the NVRA have viewed the statute the same way as those who wrote it and those who enforce it. In addition to Ohio, eighteen other states use the failure to vote either as a basis for sending notices or targeted mailings or as grounds for placing voters in an inactive status.[6]

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[5] This agreement is available on the Department's website at https://goo.gl/LzjqtC.

[6] ALA. CODE § 17-4-9 ("Any voter who fails to vote for four years in his or her county shall have his or her name placed on an inactive voter list"); ALASKA STAT. ANN. § 15.07.130(a)(3) (confirmation notice sent to each voter "who has not voted or appeared to vote in the two general elections immediately preceding"); FLA. STAT. ANN. § 98.065(2)(c) (confirmation requests may be "mailed to all registered voters who have not voted in the last 2 years"); GA. CODE ANN. § 21-2-234(a)(2) (confirmation notice is sent every other year to registered voters "whose names appear on the list of electors with whom there has been no contact during the preceding three calendar years."); HAW. REV. STAT. § 11-17(a) (sixty days after every general election, clerks "shall remove the name of any registered voter who did not vote in" the last two general and primary elections); 10 ILL. COMP. STAT. ANN. 5/4-17 (clerk "shall send to every voter who has not voted during the preceding four years a notice [of suspension] through the mails"); IOWA CODE § 48A.28(2)(b) (notice sent "to each registered voter whose name was not

reported by the national change of address program and who has not voted in two or more consecutive general elections and has not registered again"); MASS. GEN. LAWS ANN. ch. 51, § 37A (voter "not entered in the annual register . . . for 2 consecutive years and who during that time fails to vote in any election shall be maintained on an inactive voters list"); MICH. COMP. LAWS ANN. § 168.509r(6) ("if a voter does not vote for 6 consecutive years, the secretary of state shall place the registration record of that voter in the inactive voter file"); MO. REV. STAT. § 115.181(2) (election officials may choose to canvass "only those voters who did not vote at the last general election"); MONT. CODE ANN. § 13-2-220(1)(c) (election administrator shall "mail a targeted mailing to electors who failed to vote in the preceding federal general election"); OKLA. STAT. ANN. TIT. 26, § 4-120.2(A)(6) (address confirmation card sent to any "active registered voter who did not vote in the second previous general election or any election conducted by a county election board since the second previous general election and who has initiated no voter registration change"); 25 PA. CONS. STAT. ANN. § 1901(b)(3) (notice sent "to any registered elector who has not voted nor appeared to vote during the period beginning five years before the date of the notice and ending on the date of the notice"); R.I. GEN. LAWS § 17-9.1-27(b) (notice sent annually "to every active registered voter who has not voted in the past five (5) calendar years"); TENN. CODE ANN. § 2-2-106(c) (county shall mail confirmation notice "if indications exist that the voter may no longer reside at the address at which the voter is registered, such as the voter's failure to vote"); UTAH CODE ANN. § 20A-2-304.5(3)(a) (clerk sends preaddressed return form to voter who "does not vote in any election during the period beginning on the date of any regular general election and ending on the day after the date of the next regular general election"); VT. STAT. ANN. tit. 17, § 2150(d)(2)-(3) (board of civil authority "may consider and rely upon . . . any checklist or checklists showing persons who voted in any election within the last four years" as basis for sending a notice); W. VA. CODE ANN. § 3-2-25(j) (confirmation notice mailed to those who "have not voted in any election during the preceding four calendar years"). The Georgia statute is currently the subject of litigation on grounds similar to those presented here. *Common Cause and the Georgia State*

In sum, the congressional authors of the NVRA, federal officials charged with enforcing it, and state legislatures charged with drawing up implementing legislation, all have concluded that the failure to vote can be used as a basis for sending notices to voters asking that they confirm their addresses. No court or authority, other than a divided panel of the Sixth Circuit, has ever found otherwise.

II. It is Important that the Sixth Circuit's Decision Be Reversed.

Reversing the Sixth Circuit's decision will restore the meaning and efficacy of the NVRA. The correct interpretation of Section 8 of that statute has significant consequences for the State and people of Ohio, for the states whose current or contemplated statutes are placed at risk by the Sixth Circuit's decision, for Judicial Watch, and for the people of the United States, who share a common interest in electoral integrity.

Ohio, along with every other state, has a legitimate interest in fostering election integrity by removing ineligible voters from the rolls. As the Court has observed:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient

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Conference of the NAACP v. Kemp, 1:16-cv-452-TCB (N.D. Ga. 2016), *appeal docketed*, No. 17-11315 (11th Cir. Mar. 23, 2017).

> justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford v. Marion County Election Board, 553 U.S. 181, 196 (2008). The Sixth Circuit's flawed decision impairs states' ability to address their legitimate interest in ensuring election integrity.

It also impairs Judicial Watch's institutional mission to further the cause of election integrity. This mission was in view when Judicial Watch sued the State of Ohio in 2012 under Section 8 of the NVRA for an alleged failure to conduct proper list maintenance. In January 2014, the parties executed a Settlement Agreement resolving the matter, which expires on November 10, 2018. Settlement Agreement, *supra* note 3. The centerpiece of that Settlement Agreement is a provision requiring the sending of confirmation notices on an annual basis to voters who have not engaged in voting-related activity for a two-year period. *Id.* at 41, 44. The legal status of this provision obviously becomes doubtful given the Sixth Circuit's ruling. The fact that this crucial term may be invalid renders the status of the entire Settlement Agreement questionable, as it is not clear that Judicial Watch has received its bargained-for consideration. The value of the agreement to Judicial Watch is considerably diminished, and this development raises the real prospect of further litigation.

A reversal of the Sixth Circuit's decision also is in the interest of the people of the United States. It is easy to find polls and surveys showing that Americans have little faith in the integrity of their elections and postulating that this partly explains low voter turnout.[7] Restoring public confidence in the integrity of elections is in the national interest. In *Crawford*, aside from states' interest in preventing fraud, the Court identified this second important interest, namely, "public confidence in the integrity of the electoral process," which "has independent significance, because it encourages citizen participation in the democratic process." 553 U.S. at 197; *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *see also Doe v. Reed*, 561 U.S. 186, 197 (2010) (the "State's interest in preserving the integrity of the electoral process" was "particularly strong with respect to efforts to root out fraud," citing *Crawford* and *Purcell*).

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[7] *See, e.g.*, Pippa Norris, Holly Ann Garnett and Max Grömping, *Why Don't More Americans Vote? Maybe Because They Don't Trust U.S. Elections*, Wash. Post, December 26, 2016, goo.gl/zAXsiW.

CONCLUSION

For the foregoing reasons, *amicus* Judicial Watch respectfully requests that the Court reverse the Sixth Circuit's decision.

Respectfully submitted,

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RECORD AND BRIEFS

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JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* LANDMARK LEGAL FOUNDATION, *ET AL.* IN SUPPORT OF PETITIONER

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3 Debates on the Adoption of the Federal Constitution (J. Elliot ed. 1876) (James Madison, Virginia) 5

Dictionary.com (July 27, 2017, 3:37 PM), http://www.dictionary.com/browse/civil?s=t 13

Federal Election Reform Before the H. Comm. on House Admin., 107th Cong. (2001) 25, 26

Government Accountability Institute, *America the Vulnerable: The Problem of Duplicate Voting* (July 31, 2017, 3:23 PM), http://www.g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf 7

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S. Rep. No. 103-6 (1993) 22, 23, 24, 32

Virginia Decl. of Rights, The Avalon Project (July 27, 2017, 3:55 PM), http://avalon.law.yale.edu/18th_century/virginia.asp 5

Voting Technology Hearing Before the H. Comm. on House Admin., 107th Cong. (2001) 26, 27

Wikipedia, wikipedia.org (July 27, 2017, 3:40 PM), https://en.wikipedia.org/wiki/Civil_and_political_rights 13

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner, the State of Ohio. For reasons stated herein, Landmark respectfully requests the Court to reverse the decision of the Sixth Circuit Court of Appeals and grant the relief sought by the State of Ohio.

Landmark is joined by *Amici Curiae* from Tennessee, a state within the Sixth Circuit and therefore directly and negatively affected by the Sixth Circuit Court of Appeals' decision below. The Tennessee *Amici* include members of the Tennessee Senate and two individuals who have been directly involved in, and are knowledgeable about, the administration of elections under both federal and Tennessee law. They respectfully contend that the Sixth Circuit's construction of the statutes at issue was erroneous; and, further, that

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[1] The parties have provided blanket consent for the filing of *Amicus Curiae* briefs in this case. Counsel for *Amici Curiae* provided notice to counsel for parties of its intent to file this brief on July 18, 2017. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

if the ruling below is allowed to stand, the State of Tennessee will be unable adequately to maintain voter registration rolls that are correct and current, thus impairing the vital interest of the citizens of Tennessee in fair and open elections, the protection of the "purity of the ballot box," the implementation of Tennessee law requiring that each voter vote in the precinct in which he or she is domiciled, and the preservation of every citizen's civil right to have his or her vote be counted without dilution caused by illegal votes. All of the Tennessee *Amici* are citizens of, and duly qualified and registered to vote in, the State of Tennessee.

The Tennessee Legislative *Amici*, who are participating herein in their individual capacities, are: Speaker of the Senate, Randy McNally, who represents the Fifth Senatorial District, and is also the Lieutenant Governor of Tennessee; Senator Mae Beavers, who represents the Seventeenth Senatorial District; Senator Mike Bell, who represents the Ninth Senatorial District; Senator Janice Bowling, who represents the Sixteenth Senatorial District; Senator Rusty Crowe, who represents the Third Senatorial District; Senator Dolores Gresham, who represents the Twenty-Sixth Senatorial District; Senator Ferrell Haile, who represents the Eighteenth Senatorial District; Senator Edward Jackson, who represents the Twenty-Seventh Senatorial District; Senator Jack Johnson, who represents the Twenty-Third Senatorial District; Senator Brian Kelsey, who represents the Thirty-First Senatorial District; Senator Bill Ketron, who represents the Thirteenth Senatorial District; Senator Jon Lundberg,

who represents the Fourth Senatorial District; Senator Jim Tracy, who represents the Fourteenth Senatorial District; and Senator Ken Yager, who represents the Twelfth Senatorial District.

Amicus Mr. H. Lynn Greer, Jr. recently served for ten years on the Davidson County (Metropolitan Nashville) Election Commission, including four years as Chairman. He has remained active with the Commission as an election official, working at polls both during early voting and on Election Day. One of the important accomplishments of Mr. Greer's tenure on the Commission was his strong insistence that the Commission comply with the federal and state laws requiring address verification. He continued to monitor that program throughout his service. Due to his oversight, by the end of his membership, the Commission's voter rolls were accurate and well-maintained. He has seen the administrative problems that occur when voter lists are inaccurate and bloated, not only inviting fraudulent voting in the names of people who should no longer be on the rolls, but also administrative delays and confusion in the Commission office and at the polls.

Amicus Mr. Timothy Ishii, of Nashville, Tennessee, is a practicing attorney. He has served as a member of the Davidson County board to count provisional ballots and as a poll watcher during various elections. He is a member of a minority group, a disabled person, a citizen of Tennessee and a duly registered voter in Davidson County, Tennessee. Like Mr. Greer, he has had the opportunity to observe first-hand the confusion

and delays occasioned by bloated and inaccurate voter registration rolls.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ensuring integrity in the voting system is a fundamental obligation and a compelling interest of our government at all levels, from federal to local. See *City of Memphis v. Hargett*, 2013 Tenn. LEXIS 1101 (2013). Additionally, as the Court has wisely noted, public confidence in the electoral process is crucial. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Doubts concerning the system's integrity "breeds distrust of our government" and "drives honest citizens out of the democratic process." *Id.* If voters cannot be sure that adequate steps have been taken so that only eligible voters are included on the voter registration rolls, their confidence in the electoral system will perforce be undermined. They may even be less likely to vote at all.

Since the advent of our republic, the individual states have played an integral role in ensuring open and fair elections. Article I, § 4 charges the states with the responsibility to set the "Times, Places, and Manner of holding Elections for Senators and Representatives. . . ." U.S. CONST. art. I, § 4. As James Madison stated at Virginia's ratifying convention:

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to

> leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.

3 Debates on the Adoption of the Federal Constitution 367 (J. Elliot ed. 1876) (James Madison, Virginia).

The Constitution merely carried forward existing precepts of freedom, honest elections and civic responsibility. For example, the Virginia Declaration of Rights, adopted in June 1776, provides:

> A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free convention which rights do pertain to them and their posterity, as the basis and foundation of government.
>
> . . .
>
> Section 6. That elections of members to serve as representatives of the people, in assembly ought to be free; and that all men, *having sufficient evidence of permanent common interest with, and attachment to, the community*, have the right of suffrage. . . .

Virginia Decl. of Rights, The Avalon Project (July 27, 2017, 3:55 PM), http://avalon.law.yale.edu/18th_century/virginia.asp (emphasis added).

Local and state control of the election process furthers these purposes and preserves liberty. "Preservation of the integrity of the electoral process is a

legitimate and valid state goal." *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1972). See also *City of Memphis*, *supra*. Further, "The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome." H.R. Rep. No. 107-329, pt. 1, at 32 (2001). The United States Constitution reserves to the states the duty and authority to maintain accurate and up-to-date voter rolls. It defers to the states to determine the qualifications of those who may vote in Congressional and Presidential elections, with the exception that they may vote in federal elections at the age of 18. U. S. CONST. art. I, § 1; amends. XVII, XXVI.

The courts should not disturb Ohio's well-designed processes for attempting to ensure accurate voter registration rolls, which processes are consistent *not only* with the texts of the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") – the statutes presently at issue – and the clearly-expressed Congressional intent underlying them, *but also* with the U.S. Constitution and longstanding American tradition.

Ohio complies with the NVRA and HAVA, and attempts to ensure that its voter rolls are accurate and up-to-date, by using two processes enacted in 1994. 145 Ohio Laws 2516, 2521 (1994). Ohio first uses the U.S. Postal Service's National Change of Address ("NCOA") Database as a touchpoint for contacting individuals who may have moved and should no longer be on a particular voter roll. This is referred to as the "safe harbor"

method of voter verification. The "safe harbor" method does not violate the NVRA and the HAVA and it is not at issue in this appeal.

What is at issue in this appeal is Ohio's second method of verifying whether or not voters have moved from their voting district of registration. This is referred to as the "supplemental method." It is used because it is known that some persons, including some voters, move without notifying the Postal Service and other official sources of address information.[2] It is folly to assume that all voters notify official agencies when they move. By the supplemental method, Ohio addresses this situation by using a voter's lack of voting activity in the county where he is registered as the impetus for initiating the procedure to determine whether that voter should remain on a particular voter roll. Exactly like the "safe harbor method," the "supplemental method" includes a notice and opportunity for the voter to respond. *Amici* respectfully contend that the "supplemental method" is equally compliant with the NVRA and HAVA.

The Sixth Circuit invalidated this method, incorrectly ruling that the NVRA and HAVA do not permit

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[2] A recent study that compared voter history data in 21 states concluded that it was highly likely that 8,471 votes were cast in the 2016 election as a result of registration irregularities. Government Accountability Institute, *America the Vulnerable: The Problem of Duplicate Voting* (July 31, 2017, 3:23 PM), http://www.g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf. Such evidence further demonstrates the need for supplemental processes such as Ohio's.

Ohio's supplemental voter verification program. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016). While one subsection of the NVRA prohibits removal of a voter from the roll for failure to vote, another subsection allows removal of the voter for failing to vote ***and*** failing to reply to a notice directed to him or her. These subsections are not in conflict with each other; rather, they complement each other. The latter provision is consistent with the former; they are easy to construe together; and they form a logical progression.

The lower court erroneously concluded that the NVRA's general prohibition against removing individuals from voting lists for failing to vote invalidated Ohio's supplemental process that included the ***additional*** step of sending a notice to which the voter failed to respond, as a *sine qua non* to removal. *Id.* Ohio does not remove individuals from voting lists for failing to vote. Rather, it removes individuals who do not respond to verification notices triggered by a carefully constructed registration confirmation plan. The removal is based upon the entirely reasonable conclusion that such a voter has changed his address and no longer lives at the address on his voter registration record, and not merely upon his failure to vote.

A state must have a way of inferring that a voter may have moved without being deemed to violate the NVRA or HAVA, when the voter does not notify an official agency such as the Postal Service or the Tennessee Department of Safety, or the election office itself. Ohio would only be violating the NVRA and HAVA if it

summarily removed voters from the rolls without sending them a notice. Indeed, if it wanted to remove voters from the rolls "by reason of the person's failure to vote," Ohio law would not even include, as a condition of removal, the requirement of sending the notice and failing to receive a response. If Ohio were removing voters from the rolls for failing to vote, sending a notice and failing to receive a response would be a charade, a farce, and a sham.

The Sixth Circuit misconstrued the NVRA and HAVA and misapprehended the role and significance of Ohio's supplemental voter verification program, and its ruling must be reversed.

The text and legislative history of the NVRA and HAVA demonstrate that Congress both understood and affirmed the inherent power of states to ensure the integrity of their voter rolls and thus not only protect the rights of lawful voters, but also to further the interest of fair and efficient administration of elections. Congress balanced two governmental purposes: On the one hand, the need to foster voter turnout by lawful voters, and on the other hand, the compelling and time-honored need to preserve the integrity of the election process by obligating states to conduct periodic voter list maintenance. The NVRA establishes a system whereby states develop and implement systems (some of which existed before either NVRA or HAVA was enacted) to ensure that ineligible names are removed from the voter rolls. HAVA further clarifies the process by which states are permitted to implement these systems.

This is of the utmost importance to Tennessee *Amici*, in light of the Tennessee Constitution, which provides: "The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box." TENN. CONST. art. IV, § 1, cl. 2. Accuracy of voter rolls is expressly stated to be of the utmost importance in two ways: Rolls must be accurate to ensure that voters vote in the precincts where they are domiciled, and to secure the purity of the ballot box.

Beyond that, however, the Tennessee *Amici* respectfully assert that the Sixth Circuit's ruling carries a negative implication for voter verification programs nationwide, with a strong potential to affect the outcomes of elections at all levels and complicate the administration of elections and procedures at the polls. For example, if election officials are presented with irrefutable evidence of illegally-registered voters, they could interpret these statutes to prohibit them from taking any affirmative steps to investigate and if warranted, remove voters. They could conclude that they are hamstrung by the statutes at issue, and the lower court's holding is detrimental to proper election administration.

Not only do the NVRA and HAVA balance the public policies of encouraging voter registration and turnout with the compelling interest in ensuring accurate voter rolls; but also, they are expressed in state statutes, including Tennessee's, whose election statutes

are found in Title 2 of the Tennessee Code. At the outset of Title 2, Tenn. Code Ann. § 2-1-102 provides:

> The purpose of this title is to regulate the conduct of all elections by the people so that:
>
> (1) The freedom and purity of the ballot are secured;
>
> (2) Voters are required to vote in the election precincts in which they reside, except as otherwise expressly permitted;
>
> (3) Internal improvement is promoted by providing a comprehensive and uniform procedure for elections; and
>
> (4) Maximum participation by all citizens in the electoral process is encouraged.

Like the public policies embodied in NVRA and HAVA, Tennessee's election law exists to balance, effectuate and implement ***all*** of these interests.

One of the means by which this is accomplished is set out in Tenn. Code Ann. § 2-2-106, which governs removal of voters from the rolls. Pursuant to that section, some voters are "purged" – literally removed – from the rolls, including when they do provide written confirmation that they have moved outside the county, or have registered in another jurisdiction. Tenn. Code Ann. § 2-2-106(a)(5).

Of course, Tennessee has a voter verification program, set out in Tenn. Code Ann. § 2-2-106(c)-(f). It is required to "conform to the intent of this section and this part and the National Voter Registration Act of

1993, compiled in 52 U.S.C. §§ 20501 *et seq.* (formerly 42 U.S.C. §§ 1973gg *et seq.*)." Tenn. Code Ann. § 2-2-106(b). A voter identified through the verification program and sent a notice is placed on inactive status. Tenn. Code Ann. § 2-2-106(d). If the voter responds and is still domiciled in the county, the Election Commission puts him back on active status, and if he responds that he has moved out of the county, he is purged. *Id.*

If he does not respond at all, he remains on inactive status. Tenn. Code Ann. §§ 2-2-106(d) and 2-7-140 describe how a voter on inactive status can vote.

The voter's registration will be purged only if he fails to respond to the notice, ***and*** takes no other steps to update his registration, ***and*** does not vote between the sending of the notice and the second regular November election. Tenn. Code Ann. § 2-2-106(e).

The Tennessee *Amici* respectfully contend that the Ohio supplemental verification procedure that the Sixth Circuit found deficient, and the similar procedure described in the Tennessee Code, are in complete compliance with the NVRA and HAVA, and further that they provide more than adequate safeguards to preserve the voting rights of everyone who is still domiciled in the precinct, ward or district in which he is registered, and thus is entitled to continue to vote therein.

The Tennessee *Amici* also request the Court to acknowledge that *all* citizens, including all voters, have civil rights. *Anderson v. U.S.*, 417 U.S. 211 (1974), authored by Justice Marshall. "Civil" rights mean

rights "relating to or consisting of citizens; . . . of the commonwealth or state; . . . of citizens in their ordinary capacity, or of the ordinary life and affairs of citizens; . . . of the citizen as an individual; . . . befitting a citizen; . . . of, or in a condition of, social order or organized government." Dictionary.com (July 27, 2017, 3:37 PM), http://www.dictionary.com/browse/civil?s=t, see also Wikipedia, wikipedia.org (July 27, 2017, 3:40 PM), https://en.wikipedia.org/wiki/Civil_and_political_rights.

Leaving ineligible voters on the rolls increases the chances that parties intent upon committing election fraud will peruse the records, ascertain who has not voted in a while, and vote in the name of the absent voter. *Anderson*, *supra*. As the law now stands, it will be six years before an ineligible voter is removed. That allows plenty of time for an impostor to begin voting in his name, which may prevent the needed removal from ever occurring.

The other side of the same coin is that citizens, including voters, must bear responsibility for keeping their own voter registrations correct and current. See *Taylor v. Armentrout*, 632 S.W.2d 107, 113-114 (Tenn. 1981). No reasonable voter should want to remain on the rolls if she has moved from the jurisdiction, with someone else able to cast a fraudulent vote in her name. A voter should be expected to take the initiative to find out her correct voting place (and the voting place itself may change from time to time). Voters should be presumed to be intelligent and cognizant, especially in light of today's means of communication and transportation, in contrast to those of past times.

Thus, all citizens have both the ***civil right*** to have their vote cast and counted without dilution by illegal votes – to the assurance that no one is on the roll who should not be there – and the ***civic responsibility*** to keep their own registrations current.

ARGUMENT

I. Congress designed the NVRA and HAVA to balance the interests between ballot integrity and ballot access.

The NVRA and HAVA set certain standards for how states conduct voter registration and voter list maintenance for federal elections. Among other things, Congress enacted the NVRA with dual purposes: To "increase the number of eligible citizens who register to vote," while protecting "the integrity of the electoral process" by ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b).

Both statutes require and allow states to perform certain tasks and conduct programs to reduce inaccuracies on their respective voter rolls.

A. The NVRA and HAVA compel states to conduct a program to maintain accurate voter lists.

The NVRA obligates states to "conduct a general program that makes a reasonable effort to remove the

names of ineligible voters from the official lists" of registered voters. 52 U.S.C. § 20507(a)(4). HAVA obligates states to "ensure that voter registration records in the State are accurate and are updated regularly. . . ." 52 U.S.C. § 21083(a)(4). States are further tasked with protecting the integrity of their electoral processes by maintaining accurate and current voter registration rolls. 52 U.S.C. § 20507(b). To that end, states are required to conduct a "general program that makes reasonable efforts to remove ineligible voters from the official lists of voter rolls." 52 U.S.C. § 20507(a)(4). Any registration confirmation process must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Further, the NVRA mandates that no registration process can result in the removal of an individual from the list of registered voters "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

The language of subsection 52 U.S.C. § 20507(b)(2) was "appended," to use the Sixth Circuit's term (838 F.3d at 706), by HAVA to clarify and emphasize Congress's intention that an individual shall not be removed from the voter rolls "solely" by reason of failure to vote. See 52 U.S.C. § 21083(a)(4)(A).

While states are barred from removing individuals from their voter rolls for failure to vote, states are obligated to remove those individuals who have ***both*** (1) failed to vote in two or more consecutive general elections for Federal office; ***and*** (2) failed to respond to a notice sent by a designated election official. *Id.*

The process under Ohio law begins with identifying a universe of individuals whose addresses may have changed, and then giving them notice and the opportunity to respond.

1. The "safe harbor" method.

The first method by which a state ***may*** fulfill its obligation to make its "reasonable effort" to remove ineligible voters is by cross-checking against the NCOA database. 52 U.S.C. § 20507(c)(1). States are not required to use ***only*** the NCOA database. The word "may" in § 20507(c)(1) indicates that states have discretionary authority to utilize the NCOA database, but does not prohibit states from designing and implementing additional list maintenance processes. For example, Tennessee also uses the state Department of Safety driver's license records. Tenn. Code Ann. § 2-2-106(c)(1)(C).

After using the NCOA (and perhaps other cross-check sources) and identifying a universe of voters who may have moved, election officials begin the process of ascertaining who *has* moved. This entails sending a verification notice to the voters so identified.

Ohio operates two registration confirmation processes. Damschroder Dec., R.38-2, Page ID #294. The first process compares the NCOA data with Ohio's registration database to identify individuals who may have moved. *Id.* Matches of individuals who may have moved are sent to local boards of elections, which send confirmation notices to those individuals at their

addresses of registration. Failure to respond to the notice ***and*** no voter activity for four more years results in cancellation of the registration. *Id.*

This procedure is referred to as the "safe harbor" method. This procedure is not at issue in this appeal. *A. Philip Randolph Inst. v. Husted*, 838 F.3d at 704.

2. The "supplemental" method.

The second, or "supplemental," process seeks to identify voters who may have moved without notifying the Postal Service (or other official source with which the voter roll might permissibly be compared under a state law). Damschroder, *supra*. An individual's lack of voter activity for two years spurs the local board of elections to send a confirmation notice. *Id.* If the individual returns the confirmation, the voter information is updated. *Id.*, Page ID #295-96. Some voters will respond to the notice, indicating either that (1) they have not moved, (2) they have moved, but live in the same voting district as before, (3) they have moved within the county, but to a different voting district, or (4) they have moved outside the county (whether within the state or to a different state).

Other voters do not respond at all. If a voter fails to take any action (i.e., returning the card or confirming residency via the internet), ***and then*** fails to vote or update his/her registration over the next four years, the registration is cancelled. *Id.*

A state can only remove an individual from a voter roll for changing residences if one of two criteria has been met: One, the individual has confirmed in writing that he/she has changed residences to a locale outside of the registrar's jurisdiction; or, two, the individual has failed to respond to a notice ***and*** has not voted or appeared to vote in two consecutive general elections for Federal office. 52 U.S.C. § 20507(d). Thus, in Ohio, it takes six years of voter inactivity ***and*** failure to respond to a verification notice in order to remove a voter from the roll.

Like the safe harbor method, the supplemental method removes only those individuals who have ***both*** failed to engage in voter activity ***and*** failed to respond to a notice for a total of six years.

Like the safe harbor method, the supplemental method complies with the express requirements of the NVRA and HAVA.

B. Ohio's supplemental process conforms to the texts of the NVRA and HAVA.

The Sixth Circuit erroneously concluded that congressional reports pertaining to the NVRA and HAVA's voter registration confirmation procedures are ambiguous. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016). On the contrary, these reports show that Congress balanced the legitimate interests of the states in ensuring accurate voter rolls with the need to protect the rights of the voter in question – and the rights of other, properly-registered, voters. Congress

achieved this balance by prohibiting states from removing an individual from the voter rolls solely for failing to vote. The provisions that the Sixth Circuit considered ambiguous or conflicting are actually consistent and logical steps in a progression. Construed together, they simply say, "You are not allowed to do this *alone*, but you are allowed to do this *in conjunction with that*," and remove the voter from the active roll.

C. Ohio's voter verification procedure conforms to the texts, histories and purposes of the NVRA and HAVA.

The supplemental process comports with the requirements prescribed in the NVRA. It is also consistent – and does not conflict – with the dual goals stated in committee reports filed contemporaneously with the passage of the NVRA and with the enactment of HAVA.

1. The wording of the statutes is clear and permits voter verification procedures such as Ohio's.

Four sections of the statute are at issue in this case:

First, 52 U.S.C. § 20507(b)(2), which provides that the verification procedures "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote*." (Emphasis added.)

Second, 52 U.S.C. § 20507(d)(1), which provides that states "shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office *on the ground that the registrant has changed residence*" without *first subjecting the registrant to the confirmation notice procedure* outlined in that subsection. (Emphasis added.)

Third, 52 U.S.C. § 21083(a)(4)(A), in which HAVA requires states to implement

> . . . [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 ([52 U.S.C. §§ 20501] *et seq.*), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

(Emphasis added.)

Fourth, 52 U.S.C. § 21145(a), which addresses 52 U.S.C. § 20507(b)(2), adding the following clause to the general prohibition on removal by reason of failure to vote:

> . . . nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsection[] . . . (d) to remove an individual from the official list of eligible voters if the individual –

> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

The Sixth Circuit pointed out: "By the HAVA's own terms, however, this language is not to 'be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA],'" referring to 52 U.S.C. § 21145(a). 838 F.3d at 706. It also relied on H.R. Rep. 107-329, at 37 (2001), "(indicating that under the HAVA, 'removal of those deemed ineligible must be done in a manner consistent with the [NVRA]. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [the HAVA] leaves NVRA intact, and does not undermine it in any way.')." *Id.*

The Court of Appeals concluded that this provision brought the analysis straight back to § 20507(b)(2). Thus, the court was not persuaded that failing to vote combined with failing to reply to a verification notice did not violate § 20507(b)(2).

Amici respectfully argue that this is simply incorrect. While it is comforting to have § 21145(a) in the statute, § 20507(d)(1) is sufficient in and of itself to stand as an exception to § 20507(b)(2).

The only reason a voter might be removed from the rolls for failure to vote would be that there is some other underlying reason – the voter is dead, the voter is in prison, or ***the voter has moved away***. Removal of voters who have died, are in prison, etc., is covered elsewhere. Thus, "failure to vote" as used in § 20507(b)(2) is synonymous with "the registrant has changed residence" as used in § 20507(d)(1). Failure to vote is a symptom of the reason, not the reason itself.

This interpretation is logical, makes sense, and comports with the maxim that all provisions of a statute should be given effect.

2. The NVRA's legislative history demonstrates that Ohio's supplemental voter verification procedure complies with the statute.

While Congress enacted the NVRA (and later HAVA), in part to address a perceived decline in voter participation, Congress also stressed the equal and longstanding importance of maintaining accurate and up-to-date voter rolls. "Every effort [in passing the NVRA] has been made to produce a bill that balances the legitimate administrative concerns of election officials." S. Rep. No. 103-6 at 3. These concerns included, "the detection and prevention of fraud, the maintenance of accurate and up-to-date voter rolls, and the removal of the names of ineligible persons from the rolls." *Id.* The "mobility of our population" makes these

tasks "particularly difficult" for state election officials. *Id.*

Congress recognized the necessity of balancing the goal of enhancing the "participation of eligible citizens as voters in elections for Federal office" with "the need to maintain the integrity of the rolls." S. Rep. No. 103-6 at 1, 18. Indeed, Congress noted that "the maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." *Id.* at 18. The NVRA thus requires states to maintain the integrity of the voter rolls by making a "reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence." *Id.* States are authorized to maintain their voter roll integrity by operating a maintenance program in conformance with the provisions described in the NVRA.

Congress further recognized the existence of varying state voter list maintenance programs that were in effect before the enactment of the NVRA. *Id.* at 46. "Of [the states that used non-voting ***alone*** as an indication he/she may have moved], only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under the bill." *Id.* This shows that Congress was aware that certain states had programs that dropped voters from rolls solely for not voting. It further shows that Congress intended to prohibit only this specific practice – states are permitted to use not voting as one step toward removal, ***provided that*** they do not remove individuals solely on the basis of those individuals not

voting, but rather give voters notice and an opportunity to respond – the quintessence of due process.

The above-quoted statement supports the text of the statute. A state's process for confirming domicile comports with the NVRA's mandate to be uniform, nondiscriminatory and in conformance with the Voting Rights Act, provided it does not remove an individual from the voter rolls solely as a result of the individual not voting.

Congress further stated that the NVRA "suggests, but does not require, an approach election officials can use to make sure that their list cleaning method is uniform and nondiscriminatory." S. Rep. No. 103-6 at 46. Additional sources confirm Congressional intention to allow states to craft their supplemental processes, only so long as removal was not based solely on mere failure to vote:

> No State may remove the name of a voter from the rolls due to possible change of address ***unless*** the registrant confirms in writing to have moved out of voting jurisdiction, ***or*** the voter fails to respond to a notice and does not appear to vote and correct the record during period between date of notice and second general election for Federal office.

Joint Explanatory Statement of the Committee of Conference on H.R. 2: Before the H. Comm. of Conference, 103rd Cong. (1993) (emphasis added).

The Sixth Circuit's reliance on H.R. Rep. No. 103-9 stating that "one of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction," is misplaced. It begs the question – if a voter has moved, he or she is ***no longer*** "eligible to vote in that jurisdiction," and the local election offices are both entitled and obligated to ascertain who those voters are.

3. HAVA's legislative history demonstrates that Ohio's supplemental voter verification procedure complies with the statute.

Congressional reports of the debates on HAVA also conform to the precepts established by the NVRA. While HAVA addressed perceived voting registration problems that arose during the 2000 presidential election, it also confirmed the states' authority to enact programs to maintain accurate voter rolls.

To address issues related to voter registration and voting, Congress heard extensive testimony from election officials and election technology experts. Legislators in Congress proposed as many as 50 bills involving campaign finance reform or election reform. *Federal Election Reform Before the H. Comm. on House Admin.*, 107th Cong. 3 (2001) (statement of Rep. Steny H. Hoyer, Ranking Minority Member). Ultimately, Congress addressed these issues by enacting HAVA.

HAVA addresses the "disconnects" that arose following enactment of the NVRA between voter registration

systems such as DMV or social services agencies, and election officials. *Id.* at 8 (statement of Doug Lewis, Director, The Election Center). These included voter files that had become "inflated" in states such as Kansas due to zealous compliance with the registration provisions of the NVRA, without compliance with voter verification provisions. *Id.* at 14 (statement of Connie Schmidt, Election Commissioner, Johnson County Kansas). NVRA implementation also had resulted in the problem of duplicate registrations, attributable to a massive influx of registration data and a failure of individuals to notify election officials that they had moved. *Voting Technology Hearing Before the H. Comm. on House Admin.*, 107th Cong. 16 (2001). If individuals had not notified election officials that they had moved, and election officials were doing nothing affirmative to ascertain whether they had moved, this was the recipe for exactly what NVRA and HAVA were designed to prevent.

The fraudulent registration process, where identical voters appeared on multiple voting lists because they are not removed from ones on which they no longer belonged, concerned Congress as it was considering HAVA:

> The other problem is, of course, that people are not purged from the list when they move from one jurisdiction and register in another jurisdiction. They can easily vote in both places and it would not be detected under any

> system we have now. So I just wanted to lay that issue out clearly.

Id. at 17-18 (2001) (statement of Rep. Vernon J. Ehlers).

Congress singled out the voter registration process as particularly vulnerable to fraud:

> I think the greatest opportunity for fraud, is in voter registration; and we need to pay much more attention to voter fraud there and ensuring that voting lists are good, that we purge them regularly; that when someone moves, they can't keep registration at their former address and so forth.

Hearing on Technology and the Voting Process Before the H. Comm. on House Admin., 107th Cong. 39 (2001) (statement of Rep. Vernon J. Ehlers).

Expanding on the issue of the effect of a mobile population on the voter rolls, the final report from the House Committee on Administration found:

> People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income

> groups, who are more likely to move than higher-income groups within the same state.

H.R. Rep. No. 107-329, pt. 1, at 36 (2001).

After considering input from experts in voting technology and state election officials, Congress agreed to impose in HAVA, as enacted, seven minimum standards to protect the integrity of the voting process while respecting the important role states and localities play. HAVA thus imposed upon the states the implementation of a statewide registration system that would be networked to every jurisdiction within the state. HAVA also obligated the states to implement a "system of file maintenance which ensures that the voting rolls are accurate and updated regularly." *Mark up of H.R. 3295, The Help America Vote Act of 2001 Before the H. Comm. on House Administration*, 107th Cong. 3 (2001) (statement of Rep. Bob Ney, Chair).

Congress designed HAVA, in part, to ensure that voting rolls are accurate and updated on a regular basis, by clarifying the NVRA's procedures for removal of ineligible registrants. *Id.* at 4. Removal from the voter rolls would only occur ***if*** a registrant did not vote for at least two consecutive federal elections ***and*** failed to respond to a notice. When commenting at the mark up hearing for HAVA, the following exchange occurred:

> [Congressman Doolittle]: I understand everything until we get to the phrase, which says, "except that no registrant may be removed solely by reason of the failure to vote." And that seems to me to kind of muddy the water

> to what it said prior to that. So could I just ask what the effect of that is?
>
> The Chairman: Counsel is telling me you can't be removed simply because you haven't voted. *You have to have not voted and not responded to a notice.*

Id. at 12 (emphasis added).

Ranking minority member Representative Steny Hoyer further expanded on the issue raised by Congressman Doolittle:

> Mr. Hoyer: I think I understand what you are saying. If you read these two together; they both mean that you can't remove somebody for not voting solely. That is what the –
>
> Mr. Fattah: The gentleman suggested somebody should be removed from the rolls?
>
> Mr. Hoyer: That is what the National Voter Registration Act says, and therefore from our perspective if that causes you some concern, it doesn't add anything or detract anything, but from our standpoint it makes it clear that is the intent. That is what the current law is and we just wanted to indicate so we don't create a controversy outside this bill that frankly we don't need. We have got enough controversy as it is.

Id.

This sentiment is reflected in the final report from the House Committee on Administration:

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance which removes registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not voted in 2 or more consecutive general elections for federal office *and who have not responded to a notice* shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

H.R. Rep. No. 107-329, pt. 1 at 36-37 (2001) (emphasis added).

Representative Hoyer's explanation, and the final Report of the Committee on Administration taken in the correct context, underscore the Sixth Circuit's error in relying on the statement that, "[b]y the HAVA's own terms, however, this language is not to 'be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA],'" referring to 52 U.S.C. § 21145(a) and relying on H.R. Rep. 107-329, pt. 1 at 37 (2001). 838 F.3d at 706.

HAVA then reinforced the existing language from NVRA § 20507(b)(2) following the general rule prohibiting removal from the voter rolls for failure to vote:

> . . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsection (c) and (d) to remove an individual from the official list of eligible voters if the individual –
>
> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

52 U.S.C. § 20507(b)(2).

As clear as it already was, the amendment to the NVRA removed any possible confusion regarding voter removal procedures. In the original HAVA legislation, the amendment is entitled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change in residence." H.R. Rep. No. 107-730, pt. 1 at 81 (2001). Statements from legislators during hearings and mark ups show that states could only remove an individual from the voter rolls if the individual did not vote ***and*** did not respond to a notice. Under HAVA, states are obligated to remove "registrants who have not responded to a notice ***and***

who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A) (emphasis added).

Congress thus provided a roadmap for the states. Consistent with the NVRA and HAVA, an individual cannot be removed from the voter rolls solely for not voting. States ***can*** remove individuals who have failed to vote for a certain period ***and*** failed to respond to a notice.

Nothing in the debates concerning the NVRA and HAVA suggests that Congress intended to limit the states' authority to use only the NCOA safe harbor method as a touchstone for voter eligibility confirmation. In fact, accompanying reports note that the NVRA "***suggests***, but does not require" the use of the NCOA. S. Rep. No. 103-6 at 46 (emphasis added). A suggestion, rather than a specific direction, indicates that Congress did not want to limit states to using only the NCOA as the means for ensuring the integrity of voter rolls. The only specific limitation is removing a voter *solely* for failing to vote. The NVRA says that a state "may" use the NCOA system. 52 U.S.C. § 20507(c). It does not mandate that the only acceptable system is one that uses the NCOA and/or other official registries of addresses.

The voter's removal is not for failure to vote. It is because there is a reasonable inference that the voter has changed his or her place of domicile and no longer belongs on that voter registration roll.

II. The Sixth Circuit erred when it concluded that the supplemental process violates the NVRA.

Ohio uses the supplemental process to identify electors "whose lack of activity indicates they may have moved, even though their names did not appear" in the NCOA change-of-address database. Brunner Directive 2009-05, R.38-7, Page ID #401. Those individuals who have not voted for two years are sent confirmation notices. Damschroder Decl., R. 38-2, Page ID #295. Should the voter return the notice via prepaid mail or confirmation via the internet, the local board of election will update the voter's information. *Id.*, Page ID #295-96. Should the voter ignore the notice and fail to vote or update the voter's registration over the next four years, the board will cancel the registration. *Id.*

The supplemental process only removes individuals who ***both*** fail to respond to a notice ***and*** fail to either vote or update their registration for six years. The Sixth Circuit reversed the lower court's dismissal of a challenge to Ohio's supplemental process. The Sixth Circuit erred when it concluded that the NVRA and HAVA did not permit Ohio to use nonvoting at all, since it is a mere trigger to initiate a voter confirmation process whose purpose is to ascertain whether or not the voter has moved outside the jurisdiction. *A. Philip Randolph Inst. v. Husted*, 838 F.3d at 710.

Ohio has an obligation to ensure that its voter rolls are accurate. "The separate States have a continuing, essential interest in the integrity and accuracy

used to select both state and federal officials." *Arizona v. Inter Tribal Council of Ariz., Inc.*, ___ U.S. ___, 133 S. Ct. 2652, 2261 (2015) (Kennedy, J., concurring). When individuals appear to have moved from a voting district without informing their local election officials, those officials must be permitted to take reasonable steps to determine whether they should continue to be on the voter rolls. Contrary to the Sixth Circuit's holding, the procedure embodied in Ohio law, and that of other states, including Tennessee, is expressly authorized under the NVRA and HAVA.

Moreover, even if the express language of the statutes were considered ambiguous, the debates surrounding enactment of the NVRA and HAVA are clear and resolve any ambiguity: A voter cannot be, ***and will not be***, removed from the voter rolls solely for failing to vote. Failure to return a verification notice is an additional, integral and indispensable part of the removal procedure. Removal because of an inference that a voter has moved cannot take place without failure to return a notice. As noted above, voters share the responsibility to ensure that their respective counties have accurate and up-to-date information as to whether the individual is duly registered (including, if he has not voted for a while, checking to be sure that he is still on the roll). *Taylor v. Armentrout, supra*. Failure on the part of the individual to respond to a notice, in addition to voter inactivity for a period of six years, is ample justification for removal. Nothing stops a voter who has been removed, and still lives in the same county,

from re-registering and being able to vote in future elections.

CONCLUSION

Nothing in either the texts or the legislative histories of the NVRA and HAVA suggests that Congress intended to exclude the type of supplemental voter verification program employed by Ohio. In fact, the extensive discussions regarding restoring and preserving the integrity of the American ballot system support the supplemental process.

Ohio's supplemental voter verification program is consistent with the texts and histories of the NVRA and HAVA. It serves the public interest and promotes the purposes of election laws, including securing the freedom and purity of the ballot, requiring voters to vote in the precincts where they are domiciled, and promoting internal improvement by providing a comprehensive and uniform procedure; and it does not detract from encouraging maximum participation in the electoral process on the part of voters who take minimal steps to preserve their registration if they indeed have not moved.

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

—v.—

A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ROCK THE VOTE, THE NUNS ON THE BUS OF OHIO, THE TEXAS CIVIL RIGHTS PROJECT, AND THE CENTER FOR MEDIA AND DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Reno v. Bossier Parish School Board,
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Frederic Blavin, et al., *Using Behavioral Economics to Inform the Integration of Human Services and Health Programs Under the Affordable Care Act*, (Urb. Inst. July 2014) 15

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). Moreover, like this case, the *Arizona* case concerned the statutory interpretation of the National Voter Registration Act. The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009);

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs, and these letters are on file with the Clerk.

Shaw v. Reno, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

Founded in 1990, Rock the Vote is a national nonpartisan, nonprofit organization dedicated to building the long-term political strength of young people. From 1991 to 1993, Rock the Vote worked with partners including MTV, Rolling Stone, major musical artists of the era, and elected leaders to support the passage of the National Voter Registration Act of 1993. In 1999, Rock the Vote worked to further increase accessibility of the voter registration process through the creation of an online voter registration tool. Since then, Rock the Vote has continued to advocate for state and federal policies that protect the rights of all eligible voters, while supporting and building innovative technological solutions that make it easier for eligible voters to register and exercise those rights. Rock the Vote has an interest in the instant appeal because it raises important voting rights issues—in particular, issues related to the voting rights of young people and racial and language minorities—that are central to Rock the Vote's mission.

The Nuns on the Bus of Ohio ("NOTB-O") is a gathering of Catholic sisters and their supporters who comprise a subgroup of the national campaign Nuns on the Bus sponsored by NETWORK Lobby for Catholic Social Justice. NOTB-O members have been personally involved in ensuring that all voting in Ohio is fair and open. The members have countered voter discrimination at the local and state level with both on the ground voter registration and

confirmation as well as advocacy. NOTB-O works at the local level to counter systematic voter purging like Ohio's in order to prevent disenfranchising the poor and marginalized.

In its twenty-six year history, the Texas Civil Rights Project ("TCRP") has brought thousands of strategic lawsuits to protect and expand voting rights, challenge the injustices in our broken criminal justice system, and advance racial and economic justice. Today, TCRP's Voting Rights Program represents Texas communities to fight to turn the tide on the state's abysmal voting rights record by removing barriers to voter registration, supporting grassroots voter mobilization efforts, and opposing new attempts to suppress voting. TCRP currently leads a litigation effort to compel Texas to comply with the National Voter Registration Act.

The Center for Media and Democracy is a nonprofit, nonpartisan organization based in Madison, Wisconsin. Founded in 1993, it has focused on investigating and exposing abuses of power that corrupt the proper workings of democratic government. Its particular interest in this case is to bring to light, and end, state voting practices that have the intent or effect of creating discriminatory obstacles to voting.

SUMMARY OF ARGUMENT

Ohio's "Supplemental Process" for removing registrants from its voter rolls, which is triggered by an individual's failure to vote for a mere two years, violates the plain language of the National Voter Registration Act of 1993 (the "NVRA") and runs counter to Congress's intent and purpose in enacting the law. The NVRA reflects Congress's efforts to

expand voter protection beyond the Voting Rights Act of 1965, to *increase* voter participation in the United States, particularly among historically disenfranchised groups,[2] by eliminating administrative barriers to registering and voting. In enacting the NVRA, Congress found that "the right of citizens of the United States to vote is a fundamental right," "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a).

Because the Voting Rights Act did not prevent States from erecting "a complicated maze of local laws and procedures . . . through which eligible citizens had to navigate in order to exercise their right to vote," Congress deemed it necessary "to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3 (1993). Accordingly, Congress's stated purposes in enacting the NVRA were "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," "to make it possible for Federal, State, and local governments to

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[2] President Clinton, upon signing the NVRA into law, remarked: "The victory we celebrate today is but the most recent chapter in the overlapping struggles of our Nation's history to enfranchise women and minorities, the disabled, and the young with the power to affect their own destiny and our common destiny by participating fully in our democracy." Presidential Statement on Signing the National Voter Registration Act of 1993, 29 Weekly Comp. Pres. Doc. 914 (May 20, 1993).

implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). Congress also emphasized "that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." H.R. Rep. No. 103-9, at 18. Ohio's Supplemental Process is antithetical to these goals and principles.

The NVRA permits a State to remove individuals from its list of eligible voters only in limited circumstances and requires States to employ reasonable efforts to remove ineligible voters from their registration rolls. *See* 52 U.S.C. § 20507(a)(3)-(4). Although Ohio's Supplemental Process purports to rely on one of these exclusive grounds for voter purging—a registrant's change of address—it does so by selecting for removal voters who simply failed to vote. Congress was keenly aware that the failure to vote is not a reliable indicator whether a registered voter has moved, and for that reason expressly prohibited States from purging voters due to a failure to vote. *Id.* § 20507(b)(2). Congress thus squarely answered the question of whether the method utilized in Ohio's Supplemental Process is a legitimate "reasonable effort" for the maintenance of accurate voter registration rolls: it is not.

Nor can Ohio rely on the amendments to the NVRA that were included in the Help America Vote Act of 2002 ("HAVA") to rescue the Supplemental Process from invalidation. In enacting HAVA, Congress made clear that nothing was meant to undermine the NVRA; rather, Congress sought to clarify that the NVRA's prohibition against purging registered voters

due to their failure to vote does not prevent States from relying on registrants' failure to vote in two *subsequent* Federal elections *once they have been otherwise reasonably identified as potentially having changed residences*. Because the NVRA prohibits the bare use of nonvoting as a means for targeting individuals to be purged from the registration rolls, and because HAVA may not be construed "to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]," 52 U.S.C. § 21145(a)(4), HAVA does not permit Ohio's Supplemental Process.

Finally, census data support the concerns reflected in the legislative history of the NVRA that purging based on nonvoting disproportionately impacts minorities. A smaller percentage of registered minority voters show up at the polls than registered white voters, especially in mid-term elections. Ohio's Supplemental Process thus threatens to impact minorities disproportionately compared to other voters, frustrating a core goal of the NVRA: to increase voter registration, especially among minorities.

The NVRA's clear language and legislative history support the U.S. Court of Appeals for the Sixth Circuit's conclusion that Ohio's Supplemental Process violates the law.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS FAILS TO MAKE A REASONABLE EFFORT TO TARGET AND REMOVE INELIGIBLE VOTERS

A. The NVRA Requires States to Use Reasonable Efforts to Identify Voters Who Have Moved.

Congress made the following findings when it enacted the NVRA:

> (1) the right of citizens of the United States to vote is a fundamental right;
>
> (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
>
> (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a). Accordingly, one of Congress's main purposes in enacting the NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1).[3] Consistent with this objective is

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[3] Petitioner focuses on Congress's stated purposes of "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4). But the Supplemental Process does nothing to further these goals, and, in fact, has the

Congress's intent to ensure that eligible voters remain registered. Thus, the NVRA mandates that States may not remove registrants from the voter rolls except in four circumstances: at the registrant's request; upon the registrant's criminal conviction or mental incapacity, both as determined by state law; upon the death of the registrant; and, as relevant here, upon a change in the registrant's residence. 52 U.S.C. § 20507(a)(3), (4). The NVRA proscribes that in no case shall anyone be removed from the list of registered voters "by reason of the person's failure to vote." *Id.* § 20507(b)(2).

With respect to removal due to a change of address, the NVRA instructs that States must conduct a general program that "makes a reasonable effort" to remove ineligible voters from the official lists. *Id.* § 20507(a)(4)(B). It then provides an example of a reliable method to identify individuals whose residences may have changed: utilizing the U.S. Postal Service's national change of address ("NCOA") data. *Id.* § 20507(c)(1)(A). Regardless of the program employed by a State to identify voters who appear to have moved, the NVRA prohibits a State from removing someone from the list of registered voters due to a change in residence unless the registrant confirms his or her change of residence in writing, or fails to do the following after receiving the notice that

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opposite result. As discussed *infra* Part I.B, because the failure to vote is not a reliable means of identifying individuals who may have moved, the Supplemental Process leads to the removal of *eligible* voters from Ohio's registration rolls. The end result is to subvert the integrity of the electoral process, not protect it.

the NVRA mandates[4]: i) return or otherwise respond to the notice card required to be sent; and ii) vote or appear to vote in either of the next two Federal elections (referred to herein as the "Removal Confirmation Process"). *Id.* § 20507(d).

As mentioned above, the NVRA expressly sanctions the use of the U.S. Postal Service's NCOA data to identify registrants who may have moved (the "NCOA Process"). 52 U.S.C. § 20507(c)(1)(A). In fact, Congress implored States to rely on the NCOA Process because it reasonably and indiscriminately identifies potential ineligible voters: "The Committee strongly encourages all States to implement the NCOA program, which is efficient, is cost-effective . . . , and properly implemented, is uniform and objective." S. Rep. No. 103-6, at 19 (1993). Although States are free to devise other methods for identifying voters who have become ineligible due to a change in residence, they do so at their own peril, and Congress was clear that the touchstone for any such State-devised method is reasonableness: "Jurisdictions which choose not to use the NCOA program should implement another *reasonable program* which is designed to meet the requirements of the bill, i.e. that it be uniform, non-discriminatory

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[4] Specifically, the notice required by the NVRA must be a "postage prepaid and pre-addressed return card," on which the registrant can provide his or her current address, and which notifies the registrant, among other things: i) that if he or she does not return the card within the specified time, the registrant may be required to confirm his or her address prior to voting; and ii) if the registrant does not vote in either of the next two Federal elections, his or her registration will be canceled. 52 U.S.C. § 20507(d)(2)(A).

and in conformance with the Voting Rights Act of 1965."[5] S. Rep. No. 103-6, at 19 (emphasis added).

B. Ohio's Supplemental Process Violates the NVRA Because It Is Not Reasonably Tethered to Voter Ineligibility and Results in the Impermissible Removal of Registrants Due to a Failure to Vote.

The list maintenance procedures adopted by Ohio include utilizing the NCOA Process. But Ohio also uses a Supplemental Process pursuant to which it targets for removal from its list of eligible voters individuals who have not engaged in any voter activity for two years, on the ground that a failure to vote indicates that the person may have moved. If an individual is identified under either the NCOA Process or the Supplemental Process as possibly having moved out of the voting jurisdiction, Ohio initiates the Removal Confirmation Process provided for under the NVRA that can lead to registrants' removal from the list of eligible voters. *See id.* § 20507(d)(1)(B), (d)(2); *id.* § 20507(c)(1)(B)(ii) (referring to "the notice procedure described in subsection (d)(2)" as meant "to confirm the change of address").

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[5] The district court below held that the program adopted by a State need not be "reasonable" and that if a program is "otherwise lawful" under the NVRA, the State need not use "reasonable means to purge the voter rolls." *See* 2016 WL 3542450, at *9. This reading of the statute is untenable and irreconcilable with the express statutory requirement that any program must constitute a "reasonable effort" directed at removing registrants who are ineligible to vote due to a change in residence, 52 U.S.C. § 20507(a)(4)(B), and it directly conflicts with the NVRA's legislative history.

Ohio's Supplemental Process does not satisfy the NVRA's requirement that a State make a "reasonable effort to remove the names of ineligible voters" from its voter rolls. *Id.* § 20507(a)(4). Petitioner offers no basis for its assumption that lack of voting activity for two years indicates that electors "likely have moved." *See* Damschroder Decl. ¶ 12, Case No. 16 Civ. 303, ECF No. 38-2 (S.D. Ohio filed May 24, 2016). To the contrary, Congress was mindful when it enacted the NVRA that "people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17; *see also* Help America Vote Act, H.R. Rep. No. 107-329, at 71 (2001) ("[M]any voters intentionally do not vote in every race."). And yet, Congress admonished:

> [M]any States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election. As the Reverend Jesse Jackson stated during the House hearings on voter registration reform in the 101st Congress: "No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue."...
>
> ....
>
> Such purging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote,

> but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again.

S. Rep. No. 103-6, at 17-18. The flawed assumption in the Supplemental Process that nonvoting correlates to having moved is further belied by Congress's recognition at the time it enacted the NVRA of low voter turnout rates even among eligible citizens. *See* H.R. Rep. No. 103-9, at 3 (noting that there are "many factors involved in the lack of public participation" in Federal elections and that "[e]xpanding the rolls of the eligible citizens who are registered is no guarantee that the total number of voters will increase"); S. Rep. No. 103-6, at 2 (acknowledging that "there are multiple and complex factors that contribute to the decline in voter participation in Federal elections," though "most contributing factors may not be affected by legislation").

At the same time, Congress was intent on doing everything it could "to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address." S. Rep. No. 103-6, at 2. Accordingly, the NVRA expressly prohibits States from purging individuals from the voter rolls because of their failure to vote. 52 U.S.C. § 20507(b)(2). Yet, by targeting people who have not voted for two years, this is precisely what the Supplemental Process does: there is no dispute that all of the registrants actually removed from the voting rolls through the Supplemental Process are individuals who had not engaged in any voting

activity for two years prior to being identified for potential removal based on that reason alone. Requiring non-voters to take some affirmative step to confirm their continued eligibility to vote is antithetical to Congress's expressed motivations in enacting the NVRA.

Given the utter failure of the State to correlate lack of voting with a likelihood of having moved, Ohio's program cannot be said to satisfy the requirement that it make a reasonable effort to remove only ineligible voters from the rolls. It therefore violates the NVRA, as the court of appeals correctly found. 838 F.3d 699, 710-12.

C. Relying on a Failure to Vote as an Indication that a Voter Has Moved Also Runs Afoul of the NVRA's Requirement that States' Voter List Maintenance Procedures Must Be Uniform, Nondiscriminatory, and in Compliance with the Voting Rights Act.

Petitioner, and some of its *amici*, maintain that employing the Removal Confirmation Process immunizes States from liability regardless of the procedure used to identify registrants who may have moved. *See, e.g.*, Pet'r's Br. 37 ("[T]he Failure-To-Vote Clause does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure."); Br. Amicus Curiae of the United States at 28 ("[N]othing in Section 20507 explicitly requires a State to have 'reliable information' affirmatively

indicating a change in residence before sending a [confirmation] notice . . . .").[6]

But this ignores that the NVRA sets standards for any program developed by a State to monitor its voting rolls for accuracy. All such State programs and activities must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). "The purpose of this requirement is to prohibit selective or discriminatory purge programs. This requirement may not be avoided by . . . conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity." H.R. Rep. No. 103-9, at 15. Moreover, Congress intended "to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards *on any activity that is used to start, or has the effect of starting, a purge of the voter rolls*, without regard to how it is described or to whether it also may have some other purpose." *Id.* at 31 (emphasis added). There are, therefore, clear limits to a State's discretion in how it designs a program aimed at

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[6] Of course, as its *amicus* brief candidly acknowledges, the United States' current position represents a complete about-face from its prior views, occasioned by the "change in Administrations." U.S. Sup. Ct. Amicus Br. at 14. Just last year, the United States appeared in this case as *amicus curiae* in the Sixth Circuit on behalf of Respondents herein, where it unequivocally maintained that "States cannot use non-voting, without more, as evidence of a change in residence sufficient to trigger the confirmation process." U.S. 6th Cir. Amicus Br. at 10; *see also id.* at 9 ("[I]nitiating the removal process without *some* reliable evidence to suggest that voters have moved cannot qualify as the 'reasonable effort' the statute requires to identify voters who are no longer eligible." (citing 52 U.S.C. § 20507(a)(4))).

maintaining accurate voter registration rolls, and a State may not rely on the NVRA's Removal Confirmation Process to cleanse an otherwise tainted program that improperly targets a select group of voters for removal.

Requiring registrants to perform some affirmative act to remain on the voter rolls, simply because they have not voted, discriminates against individuals who do not vote in a given election, and as discussed *infra* Part III, affects minority voters in particular. The Supplemental Process thus constitutes a "selective" voter purging method prohibited by the NVRA as it is certain to result in the removal from the rolls of numerous individuals who continue to remain eligible to vote.

This discriminatory effect is exacerbated by the normal human response—substantiated by social science—to decline participation in programs where affirmative steps are required. Under the Supplemental Process, infrequent voters who receive a confirmation notice will be removed from the rolls unless they do something to halt the removal process. Even modest administrative requirements have been shown to reduce "take up" or participation rates in a variety of public programs. *Cf.* Frederic Blavin, et al., *Using Behavioral Economics to Inform the Integration of Human Services and Health Programs Under the Affordable Care Act*, at 10 (Urb. Inst. July 2014) ("[W]hen consumers must meet apparently modest procedural requirements, such as checking an opt-in box, *returning a simple form*, or making a telephonic or on-line acknowledgment, they are much less likely to participate in available programs, because of inertia, procrastination, short-term orientation, distraction, confusion, actual underlying preferences, or other factors." (emphasis added));

Donald Moynihan, et al., *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. Pub. Admin. Res. & Theory 43, 46 (Jan. 2015) (positing that behavioral economics explains why burdens "that seem minor and defensible" may "exert dramatic effects when experienced by citizens").

Numerous studies demonstrate the impact of affirmative opt-in requirements on participation rates across a wide range of behaviors, including organ donation, car insurance preferences, and online privacy settings and information sharing. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1 (2013) (summarizing studies). Similarly here, Congress implicitly recognized that administrative requirements can be a barrier to voter participation when it eliminated reregistration requirements. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (identifying annual reregistration requirements as among the "techniques developed to discourage participation").[7] Given this reality of human behavior, many recipients of a confirmation notice can be expected not to respond. It is therefore vital that the population of voters who receive the confirmation notice be selected based on objective and reliable criteria for believing that they may have moved, not

---

[7] It has also been suggested that administrative burdens can serve as a means of "hidden politics" that appear to be "technical fixes without any specific policy intent," but are, in fact, preferences by political actors. Moynihan, *supra*, at 52-53 ("For example, increasing burdens might be justified as a means to prevent fraud, even if their intended instrumental effect is to support other partisan goals (such as reducing the size of the welfare state, or limiting voter turnout in the case of elections).").

because they have failed to vote.[8] Because Ohio's Supplemental Process fails to meet that standard, it violates the NVRA.

II. NOTHING IN HAVA ALTERS THE NVRA'S PROHIBITION AGAINST PURGING VOTERS FROM THE REGISTRATION ROLLS DUE TO A FAILURE TO VOTE

When it enacted HAVA, Congress was clear that nothing in that legislation was meant to undermine the NVRA. HAVA was enacted in response to the 2000 presidential election and the fallout from the litigation that ensued over Florida's recount. *See, e.g.*, H.R. 107-329, at 59 ("The disadvantages of punch card voting systems were highlighted during the recount that took place in Florida following the November 2000 election. Large portions of the American public have lost confidence in them."). Congress incentivized States to modernize their voting systems by offering election funds for States that met certain criteria. HAVA is consistent with the general theme of the Voting Rights Act and the NVRA, namely, to *increase* voter participation. It

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[8] Petitioner also appears to suggest that its Supplemental Process is more lenient than the NVRA's Removal Confirmation Process because the former allows a longer period of time before a registrant is removed from the voting rolls (six years versus four). *See* Pet'r's Br. 26. But that is a red herring. The Removal Confirmation Process is a congressionally sanctioned procedure for removing a registrant from the voting rolls only after a State has reliable information that the individual has moved, and Congress determined that a four-year removal period was appropriate in such circumstances. Ohio cannot cure the impropriety of commencing the removal process based on an individual's failure to vote simply by extending the actual removal period beyond the statutorily-permissible four years.

sought to achieve this by: setting minimum standards for statewide voting registration systems; creating a Federal Election Assistance Commission to assist States in following best practices for administering elections; establishing the Help America Vote Foundation and College Program to encourage increased participation in the electoral process among young voters; encouraging States to allow in-precinct provisional voting; and making it easier for military personnel and citizens living abroad to vote. *See generally* Pub. L. No. 107-252, 116 Stat. 1666 (2002).

The only connection HAVA has to the NVRA's voter purging guidelines is to clarify that a State may rely on the Removal Confirmation Process set forth in the NVRA (i.e., a failure to respond to the required notice coupled with the failure of the individual to vote in two subsequent general elections) *to confirm that a voter has, in fact, changed residences*. Section 903 of HAVA is entitled, "Clarification of Ability of Election Officials to Remove Registrants from Official List of Voters *on Grounds of Change of Residence*." (emphasis added) Prior to HAVA, the NVRA provided, in relevant part:

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

42 U.S.C. § 1973gg-6(b)(2) (2000). The purpose of section 903 of HAVA was merely *to clarify* that a State with reason to believe that a voter has changed

residences may rely on the Removal Confirmation Process in the NVRA *to confirm* the voter's change of address:

> Section 8(b)(2) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-6(b)(2)) is amended by striking the period at the end and inserting the following: ", except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Pub. L. No. 107-252, 116 Stat. 1666, 1728.

Because, as reflected in the legislative history of the NVRA, an individual's failure to vote in a single election (such as a mid-term election) is not evidence that the person has changed residences, Section 903 of HAVA likewise does not permit a State to use the failure to vote as a basis to start the purging process. Indeed, the Joint Explanatory Statement of the Committee on Conference for HAVA includes the following warning:

> The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act (NVRA).

> The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this Act. Accordingly, [HAVA] leaves NVRA intact, and does not undermine it in any way.

H.R. Rep. No. 107-329, at 66. For avoidance of doubt, HAVA explicitly provides that it may not be construed "to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a)(4). Accordingly, HAVA does not permit Ohio's Supplemental Process.

III. THE SUPPLEMENTAL PROCESS DISPROPORTIONATELY DISENFRANCHISES MINORITIES

The NVRA was enacted in the wake of decades marking a proliferation of state laws and procedures aimed at keeping certain groups of citizens from voting, including immigrants, minorities and the poor. *See* H.R. Rep. No. 103-9, at 2. While great strides have been made to close the gap, the percentage of minorities who register and vote is still less than that for whites. Nationwide census data confirms that turnout differentials persist between whites and non-whites. *See generally* U.S. Census Bureau, Voting and Registration Tables, *available at* https://census.gov/topics/public-sector/voting.html (last visited September 21, 2017). The gap exists during Presidential elections (except for 2012, when voting rates for non-Hispanic blacks exceeded that for non-Hispanic whites for the first time in Presidential

elections since 1980),[9] but it is particularly stark in midterm election years: "Since 1978, voting rates for non-Hispanic blacks and Hispanics have trailed those for non-Hispanic whites in every congressional election . . . ."[10] Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, at 5 (2015), *available at* https://census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

Moreover, as particularly relevant here, even when viewed in terms of individuals registered to vote (as opposed to those merely eligible), the turnout rates for minorities still lag behind that of whites. For example, in the most recent midterm election year, 2014, census data reflects that 67% of registered non-Hispanic whites turned out to vote as compared to 63% of registered blacks, 56% of registered Asians and 53% of registered Hispanics. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2014, *available at* https://census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html (follow links under "Table 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2014")

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[9] *See* Thom File, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (2017), *available at* https://census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

[10] As used in this context by the U.S. Census Bureau, "voting rates are calculated by dividing the total number of reported voters by the total number of eligible voters (i.e., citizens who are at least 18 years old)." *Id.* at 2.

(last visited September 21, 2017).[11] Given the racial gap in voter turnout rates, Congress's efforts to protect from improper removal individuals who vote only sporadically are particularly important for voters of color. Yet, because the Supplemental Process targets individuals for removal based on their failure to vote in even one election, it has a disproportionate impact on minorities, particularly following midterm election years.

Even if response rates to the confirmation notice or subsequent voting activities are substantially comparable across races, minorities are likely to be removed from the voter rolls at a greater rate than whites based on the initial trigger. This disparity was noted prior to passage of the NVRA. *See* S. Rep. No. 103-6, at 17-18 (noting that, by relying on non-voting as a trigger for removal, "many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities"); *id.* at 18 ("[Purging] processes . . . must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register. Such processes must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.").

---

[11] To calculate the turnout rates among registered voters, divide (i) the value reflected in the "US Citizen" column showing the "Number" of "Both sexes," "Total 18 years and over," who "Reported voted," by (ii) the value reflected in the "US Citizen" column showing the "Number" of "Both sexes," "Total 18 years and over," who "Reported registered."

The discriminatory impact of this procedure was Congress's precise concern when it passed the NVRA. *See id.* at 3 ("[T]he Committee has been concerned with the impact of a regulation or practice on the exercise of the right to vote and not with the question of whether its impact was intentional or inadvertent."). As a result of the Supplemental Process, a greater percentage of voters of color who remain eligible are likely to be removed from the voter rolls in Ohio and will be required to reregister in order to regain their constitutional right to vote. Thus, using the failure to vote as a trigger for removal continues the very "discriminatory nature of periodic voter purges" that the NVRA sought to redress. *Id.* at 20.

Contrary to the language and intent of the NVRA, the Supplemental Process is likely to *decrease* registration and turnout rates among eligible citizens of color, because it is based on a standard that has a disproportionate impact on minorities. This is the opposite of what Congress intended in enacting the NVRA.

CONCLUSION

For the foregoing reasons, as well as those in Respondents' Brief, the judgment of the U.S. Court of Appeals for the Sixth Circuit should be *affirmed*.

September 22, 2017

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JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF OHIO, AND THE BRENNAN CENTER FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Conn. Gen. Stat. § 9-32 23

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Del. Code tit. 15, § 1704(a) 22

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Ga. Code § 21-2-234(a) 24

Ind. Code § 3-7-38.2-2 ..... 21, 22, 23

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17 R.I. Gen. Laws § 17-9.1-27(b) 24

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Va. Code § 24.2-404.4 22

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Equal Access to Voting Act of 1989: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 101st Cong. 89 (1989) 8

Equal Justice to Voting Act of 1989: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 101st Cong. 82 (1989) 6

H.R. Rep. No. 103-9 (1993) 4, 5

Ohio Sec'y of State, *2012 Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2012-elections-results 16, 17

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Ohio Sec'y of State, *2014 Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results; 16, 17

Ohio Sec'y of State, *2016 Official Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results 16, 17

Ohio Sec'y of State, *Voter Turnout: November 2, 2010*, https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/voter-turnout-november-2-2010..... 16

Presidential Comm'n on Election Admin., *The American Voting Experience* 48 (2014)..... 19

S. Rep. No. 101-140 (1989)..... 6

S. Rep. No. 103-6 (1993)..... 4, 5, 7, 9

U.S. Census Bureau, Geographical Mobility: 2015 to 2016 (2016), https://www.census.gov/data/tables/2016/demo/geographic-mobility/cps-2016.html 10

TABLE OF AUTHORITIES—continued

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U.S. Census Bureau, Voting and Registration in the Election of November 2014 (2015), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html 10

U.S. Census Bureau, Voting and Registration in the Election of November 2016 (2016), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html 11

U.S. Election Assistance Comm'n, The 2014 EAC Election Administration and Voting Survey Comprehensive Report, (2015), https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf 9

U.S. Election Assistance Comm'n, The 2016 Election Administration and Voting Survey Comprehensive Report (2017), https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_ Report.pdf 9

U.S. Gov't Accountability Off., GAO-14-850, Elections: Observations on Wait Times for Voters on Election Day 2012 (2014) 19

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Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin., 101st Cong. 134 (1989) 6

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INTEREST OF *AMICI CURIAE*

The League of Women Voters of the United States ("League") is a nonpartisan, community-based organization that encourages Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in approximately 750 communities and in every state. For over ninety years, the League has led efforts to remove barriers that Americans face in registering to vote and casting a ballot.[1]

The League was deeply involved in crafting the National Voter Registration Act of 1993 ("NVRA"), having provided substantial testimony and input over the course of the NVRA's legislative history, specifically on the topic of purges for failure to vote. *See, e.g., Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 149 (1989) (testimony of Nancy M. Neuman, President, League of Women Voters); *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong. 140 (1993) (testimony of Becky Cain, President, League of Women Voters).

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

The League of Women Voters of Ohio ("LWVO") is the state affiliate of the League. It is a nonpartisan political organization, which encourages informed and active participation in government. There are thirty-three local Leagues around the state. The LWVO has fought unlawful voter restrictions and believes that voting is a fundamental citizen right that must be guaranteed. The LWVO's local Leagues register voters, perform public education, conduct research, and engage with public officials on issues related to registration and voting.

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and to prevent manipulation of electoral rules. The Brennan Center conducts empirical, qualitative, historic, and legal research on electoral practices, including on voter list maintenance practices. In 2008, the Center published a comprehensive report examining the voter roll purge practices in the United States based on in-depth interviews of state and local election administrators. Moreover, the Center has litigated numerous cases involving purges of the voter rolls, and submitted numerous amicus briefs in this Court on voting rights matters.

SUMMARY OF ARGUMENT

The purge provisions contained in Section 8 of the NVRA are designed to prevent states from instituting practices to remove registered voters from the rolls based on unreasonable inferences that the voter has become ineligible. The NVRA requires states to make "a reasonable effort to remove the names of ineligible voters," and bars states from taking unreasonable steps to remove voters from the rolls, such as removing individuals for non-voting or removing voters based on an unsubstantiated belief that the voter has moved. The legislative history and the NVRA's text confirms Congress sought to protect voters against having to needlessly re-register because of purges based on unreasonable inferences. *See* Part I.

Ohio's Supplemental Process of commencing a purge based on the failure to vote in a single federal election cycle is not reasonable. It is wildly overbroad and does not target individuals who may no longer be eligible. In this case, Ohio began the first step in purging over half its registered voters—by sending notices to some four million people—after they failed to vote in a single federal election cycle in 2010. Ohio compounded the unreasonableness of its action by not clearly informing these voters that they would be removed from the voter rolls if they did not act in response to the notice. And Ohio stands alone: it is one of only six states that expressly commences deregistration based on the failure to vote. Yet Ohio is the *only* state that commences such a process based on the failure to vote in a single federal election cycle. Section 8 of the NVRA was designed to prevent such practices.

ARGUMENT

I. Section 8 of the NVRA Was Intended to Prevent Purges Based on Unreasonable Inferences.

1. When Congress enacted the NVRA, it did so against a historical backdrop in which states routinely imposed obstacles to voter registration to limit the franchise. Such "[r]estrictive registration laws and administrative procedures were introduced in the United States . . . to keep certain groups of citizens from voting; in the North, the wave of immigrants pouring into the industrial cities; in the South, blacks and the rural poor." H.R. Rep. No. 103-9, at 2 (1993). Indeed, "[t]hroughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote—which groups specifically depending on the decade and the locale." S. Rep. No. 103-6, at 3 (1993). Congress rightly condemned "discriminatory and unfair registration laws and procedures" that had "a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3).

Among the obstacles Congress addressed in the NVRA were efforts to deregister or "purge" voters who remained eligible to vote. Congress's reforms of purge practices are found in Section 8 of the NVRA. An animating goal of Section 8 was to prevent deregistration procedures premised on unreasonable inferences that a registered voter was no longer eligible to vote. The Senate Committee on Rules and Administration explained that Section 8 was intended to "ensure that once a citizen is registered to vote,

he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 17 (1993). The committee further noted: "The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud. These processes, however, must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly reregister." *Id.* at 18.

Congress heard about these problems over the course of successive legislative sessions.[2] In fact, the congressional record is replete with complaints about abusive practices where persons still eligible to vote were removed from the rolls. The record established both that certain purges had been conducted in a discriminatory manner, and that other purges arbitrarily purged individuals based on an unreasonable inference that the individual was no longer eligible to vote. Among the injustices documented for Congress were "selective" purges, insufficient or no notice to registrants about their removal, purges too close to an election for citizens to refresh or renew their registrations in time to vote, and other disenfranchisement measures. *See generally* S. Rep. No. 103-6, at 3 (1993) (identifying specific practices that inhibited or excluded potential voters); *Voter Registration: Hearing Before the Subcomm. on Elections of the*

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[2] The legislative hearings and debate concerning the NVRA were conducted during the 100th, 101st, 102nd, and 103rd Congresses. *See* H.R. Rep. No. 103-9, at 4-5 (1993). Following its passage during the 102nd Congress, the legislation was vetoed. Thereafter, the legislation passed and was signed into law during the 103rd Congress.

Comm. On H. Admin., 101st Cong. 149 (1989) (testimony on purged voters having insufficient time to reregister to vote); *id.* at 134 (same); *id.* at 202-03 (testimony regarding absence of notice to purged voters).

Prominent among the practices condemned during the congressional testimony was the practice of purging registered voters who had not voted in the most recent election.[3] As the Committee on Rules and Administration report summarizes:

> If there was a single point of agreement among all participants in the hearings on voter registration, it was the fact that not only is voting a right, but also, in this country, everyone has an equal right to choose not to vote. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election.

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[3] *See, e.g., Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 149, 201 (1989) (discussing New York City purges resulting in 350,000 individuals being dropped from rolls before the 1988 Presidential Primary and over 300,000 purge notices were prepared just prior to the 1989 mayoral primary); *Equal Justice to Voting Act of 1989: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 101st Cong. 82 (1989) (discussing 1988 Atlanta purge of 25,000 voters for not voting in recent elections prior to Presidential primary); *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 134 (1989) (discussing 1989 Chicago purge of individuals who had not voted in recent elections prior to mayoral election).

S. Rep. No. 101-140, at 12 (1989).[4]

During congressional hearings, witnesses not only condemned the arbitrary and discriminatory effects of purging non-voters, they also challenged the basic premise behind conducting such purges—that is, the inference that a person's failure to vote signifies that he or she has moved or is otherwise ineligible to vote. As the Senate Rules Committee observed: "[W]hile voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17 (1993). Removals of non-voters, the Committee concluded, are overinclusive. "Such citizens may not have moved or died or committed a felony." *Id.*

Throughout the Congressional hearings and debate, witnesses and members of Congress explained why the failure to vote does not a support an inference that a voter is ineligible. For example, in 1989, League President Nancy M. Neuman testified at some length about the many reasons why voters do

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[4] *See also Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. at 149 (testimony of Nancy M. Neuman, President, League of Women Voters); *id.* at 135 (testimony of Jesse Jackson, President, National Rainbow Coalition); *id.* at 154 (testimony of Pamela Monroe Young, Legal Dir., NAACP); *id.* at 254 (testimony of Frank R. Parker, Dir., Voting Rights Project, Lawyers' Committee for Civil Rights Under Law); *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong. 106 (1993) (testimony of Emmett H. Fremaux, Jr., Exec. Dir., Washington DC, Board of Elections and Ethics); *id.* at 109 (statement of Edward A. Hailes, Counsel, Washington Bureau, NAACP).

not vote in particular elections—none of which support the conclusion that voter is ineligible:

> Whatever may be a voter's reasons for choosing not to vote—lack of interest in or confusion about a particular election, disbelief that the issues presented will adequately express one's concerns or that the candidates are worthy of one's support, inaccessibility of the polling place, absence, emergency, health, even general lack of interest—one should not have the right to vote stripped away.

Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin., 101st Cong. 149 (1989) (statement of Nancy M. Neuman, President, League of Women Voters).

Senator Wendell Ford, the Senate sponsor of the NVRA, argued that "[w]e can put an end to unnecessary reregistration by voters who choose to be heard by not voting. . . . Some, even Senators, abstain from voting . . . . And that speaks as loud as a yea or a nay. So they want to be heard by choosing not to vote. And then we penalize them under our present system for not voting." 139 Cong. Rec. S2,390 (1993) (statement of Sen. Ford). Similarly, Senator Kennedy, a co-sponsor of the legislation, observed that "[m]any people who are registered don't vote as a matter of civil protest." *Equal Access to Voting Act of 1989: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 101st Cong. 89 (1989).

Deborah Karpatkin, Legal Director of Human SERVE, likewise pointed out that voters may abstain from voting in one or more elections

> because they don't wish to vote for any of the candidates available to them. The only way these voters can express their displeasure with the candidates is to vote with their feet—that is, to not show up. I don't know of any ballots in the country where you can check "None of the above."

Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin., 101st Cong. 201 (1989) (testimony of Deborah Karpatkin, Legal Dir., Human Serve); *see also* S. Rep. No. 103-6, at 17 (1993) ("No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue.").

These observations and the resulting legislative judgment make good sense. In every election, there are *tens of millions* of registered voters who do not vote. For example, in 2016, the U.S. Election Assistance Commission counted almost 74 million registered voters across the country (37.02%) who did not cast a ballot in the general election.[5] Voter participation is even lower in non-Presidential elections: in 2014, almost 110 million registered voters across the country (57.45%) did not cast a ballot in the general election.[6] While different data from the U.S.

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[5] *See* U.S. Election Assistance Comm'n, The 2016 Election Administration and Voting Survey Comprehensive Report 21 (participating voters) (2017), https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

[6] *See* U.S. Election Assistance Comm'n, The 2014 EAC Election Administration and Voting Survey Comprehensive Report 11 (participating voters), 18 (registered voters) (2015), https://www.eac.gov/assets

Census Bureau show a smaller number of registered non-voters in 2014—roughly 50 million—that number is still vast.[7]

These numbers far exceed the number of registered voters who move outside their county each election cycle, and thus become ineligible to vote in that district. *See* 52 U.S.C. § 20507(e)(1)-(2). According to the U.S. Census Bureau, about ten million residents age 18 or older moved outside their county between 2015 and 2016. *See* U.S. Census Bureau, Geographical Mobility: 2015 to 2016 tbl.1 (2016), https://www.census.gov/data/tables/2016/demo/geographic-mobility/cps-2016.html.[8] That means that even if one assumes that every single adult mover failed to take any steps to update their registration information, moving still would account for less than one-seventh of the non-voting activity in 2016, based on figures from the U.S. Election Assistance Commission.

Survey data of registered voters who do not vote confirms that there are many reasons why an eligible voter might abstain from voting—none of which implicates ineligibility. For example, a U.S. Census Bureau survey of 18,933 registered voters who did

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/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf.

[7] U.S. Census Bureau, Voting and Registration in the Election of November 2014 tbl. 4a (2015) (Total voted and Total registered), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html.

[8] Census data indicate that between 2015 and 2016, about 26 million residents over the age of 18 moved. *See* U.S. Census Bureau, Geographical Mobility: 2015 to 2016 tbl.1 (2016), https://www.census.gov/data/tables/2016/demo/geographic-mobility/cps-2016.html.

not vote in the 2016 election found that most of these individuals did not vote because they:

- "did not like candidates or campaign issues" (24.8%);
- were "not interested" (15.4%);
- were "too busy" or had "conflicting schedule" (14.3%);
- had "illness or disability" (11.7%);
- were "out of town" (7.9%);
- "forgot to vote" (3.0%);
- had "transportation problems" (2.6%); or
- had an "inconvenient polling place" (2.1%).[9]

Only 4.4 percent of respondents claimed that they did not vote because of "registration problems." Even if, in the unlikely event, every single one of these respondents experienced such problems because they moved, that accounts for at most 4.4 percent of those who do not vote.

These data demonstrate that it is unreasonable to infer that a person did not vote *because* he or she has moved or is otherwise no longer eligible to vote.

2. Congress addressed this issue in Section 8 of the NVRA, which provides the basic rules for conducting purges. Section 8 directs states to make

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[9] U.S. Census Bureau, Voting and Registration in the Election of November 2016 tbl.10 (2016), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html. An additional 11.1% provided another reason, and 2.7% responded that they did not know or refused to answer.

"reasonable efforts" to maintain accurate rolls of voters. Preventing eligible registrants from being purged arbitrarily is an essential aspect of reasonableness.

The NVRA specifies only five reasons for which voters may be removed from the rolls: (i) the voter requests to be removed, 52 U.S.C. § 20507(a)(3)(A), (ii) the voter is ineligible under state law due to criminal conviction, *id.* § 20507(a)(3)(B), (iii) the voter is ineligible under state law due to mental incapacity, *id.*, (iv) the voter has died, *id.* § 20507(a)(4)(A), or (v) the voter has moved out of the jurisdiction, *id.* § 20507(a)(4)(B).

The first four factors—voter request, criminal conviction, adjudication of mental incapacity, and death—are derived from ascertainable, recorded facts. Accordingly, purges on those bases are relatively straightforward. In contrast, assessing whether a voter has moved but has not so informed election officials is often very difficult. Because of this, the NVRA contains additional restrictions specifically aimed at purges based on an assumed change in residence. The statute expressly recognizes only three permissible processes for purging voters on the ground that they have moved.

First, the NVRA allows states to begin the deregistration process when the Postal Service provides information that the voter has moved. *Id.* § 20507(c)(1). If the Postal Service has information that an individual has moved, it is reasonable for a state to infer that the individual may have, in fact, moved. Yet, Congress still insisted that the state verify the move through the Section 8(d)(2) procedure. *Id.* § 20507(c)(1)(B)(ii).

Second, the NVRA allows a state to remove a voter from the rolls if the voter confirms in writing that the voter has moved. *Id.* § 20507(d)(1)(A). If an individual confirms that she or he has moved, it is of course reasonable for the state to act on that information.

Third, after receiving or obtaining credible information that a voter has moved,[10] the NVRA allows a state to send a forwardable notice to the voter with a prepaid return card requiring the voter to confirm her residence, *i.e.*, the Section 8(d)(2) notice. If the voter does not return the card and does not vote in the next two federal elections, it is not unreasonable for the state to infer that the voter has moved. *Id.* § 20507(d)(2).

But even when states follow these steps, the NVRA still limits states' discretion on how to implement a removal program in a number of ways:

First and foremost is the limitation at issue in this case: the statute explicitly prohibits states from purging registered voters "by reason of the person's failure to vote . . . ." *Id.* § 20507(b)(2). This provision is not an isolated limitation; it is part of a series of limitations on how states can remove from the rolls individuals suspected of moving.

The statute further requires that purges based on moving (among other grounds) occur only pursuant to a "general program" involving "reasonable effort[s]." *Id.* § 20507(a)(3)(C), (4). And, more generally, the statute bars any purges that are not

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[10] As discussed *infra* Part II.B, there are a number of ways for states to secure credible information that a voter has moved.

"uniform" and "nondiscriminatory." *Id.* U.S.C. § 20507(b)(1).

Congress did not stop there. The NVRA also provides additional, more specific limits on state programs to purge registered voters:

- If a voter has moved to a different address in the same jurisdiction but did not update her address, the voter is nonetheless entitled to vote. *Id.* § 20507(c)(1)(B)(i).
- If a voter is mailed a forwardable notice with the prepaid return card and the voter does not return the card but appears to vote at any time before the next two elections, the voter may not be purged. *Id.* § 20507(d)(2).

These prohibitions are directed at the accuracy of inferences about ineligibility, including in particular whether a failure to vote in a single federal election cycle signifies that the voter has become ineligible. For the present case, this is significant for two reasons.

First, the "failure to vote" prohibition is part of a related series of protections against purging individuals based on unreasonable inferences that they may have moved. That provision should be interpreted in a manner consistent with that objective, and not in a way that defeats it. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.") (internal quotation marks omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990).

Second, Congress was so deeply concerned about inaccurate purging, especially when seeking to

remove a voter because she has moved, that it erected multiple safeguards to curb that practice. The prohibition on purging by reason of non-voting is a critical safeguard against inaccurate purges of individuals suspected of moving; indeed, it lies at the center of Congress's intended protections for the right to vote or not vote.

While the NVRA does not expressly address every practice a state might use to determine whether a voter becomes ineligible, and allows states some flexibility, the NVRA directs states to "conduct a general program that makes a *reasonable* effort to remove the names of ineligible voters." 52 U.S.C. § 20507(a)(4) (emphasis added). And it bars states from removing voters from the rolls based on change in residence unless removal is part of that general, reasonable program. *Id.* § 20507(a)(3)(C) (barring change-in-residence removals except pursuant to 52 U.S.C. § 20507(a)(4)). For the reasons described below in Part II, a program like Ohio's Supplemental Process, which is initiated when a voter fails to vote in just one election, does not pass Congress's test.

II. Ohio's Supplemental Process Is an Entirely Unreasonable Method of Determining Ineligibility.

Ohio's Supplemental Process is not a reasonable measure to maintain accurate voting rolls by identifying and removing ineligible voters. As Congress recognized in the NVRA, failure to vote in a single election is a lousy proxy for assessing whether a registered voter has moved or otherwise become ineligible to vote. That is why the overwhelming majority of states expressly do not rely on failure to

vote at all. There are four outlier states, but none is as aggressive as Ohio.

Only Ohio deregisters voters based on their failure to vote in a *single* federal election cycle. As a result, the purges that are at issue in this litigation were commenced following a non-Presidential election (in 2010) in which half of Ohio registered voters—some four million people—did not vote. Such a process cannot be considered reasonable within the meaning of the NVRA.

A. Failure to Vote in One Federal Election Cycle Is Not a Reasonable Proxy for Voter Ineligibility.

1. Ohio's Supplemental Process starts from an unjustified premise. It is unreasonable to infer that a person may have moved (or died or been disenfranchised) simply because the registrant failed to vote in a single federal election cycle.

The number of affected voters is startling. For example, during the Presidential election in 2016, 28.67% of Ohio registered voters did not vote, and in 2012, 29.46% did not vote.[11] As with the national trends, non-voting is even higher in non-Presidential elections: in 2014, 59.35% of Ohio registered voters did not cast a ballot, and in 2010, 50.78% did not vote.[12] Those percentages translate into millions of

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[11] Ohio Sec'y of State, *2016 Official Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results; Ohio Sec'y of State, *2012 Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2012-elections-results.

[12] Ohio Sec'y of State, *2014 Elections Results*, https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results; Ohio Sec'y of State, *Voter Turnout:*

eligible voters that choose to stay home on election day in Ohio: over 2.2 million in 2016, and over 2.3 million in 2012.[13] In non-presidential election years, the numbers double. In 2014, 4.6 million registered Ohioans did not vote, and 4.1 million did not vote in 2010.[14] While Ohio speculates that those numbers might be inflated by including non-eligible voters, it offers no data to substantiate that assumption. In any event, commencing a purge of all such individuals—as Ohio did here—is not reasonable.

2. Ohio compounded the unreasonableness of its program by sending ineffectual notices under Section 8(d)(2) that failed to warn voters to take a specific action or face removal from the rolls. Petitioner's argument that its notice prevents any violation of the NVRA because its purges are based on a "failure to respond to a notice," and not the failure to vote, *see* Pet. Br. 23-29, ignores that its own practice failed to make clear that voters needed to respond. The court below found that Ohio's 8(d)(2) notices "did not adequately inform voters of the consequences of failing to respond to the notice; rather, the form indicated that the recipient's registration 'may' be canceled if he or she did not respond, re-register, or vote in the next four years." Pet. App. 6a. Notably, Petitioner does not dispute this finding. *Id.* at 8a-9a. Ohio's inadequate 8(d)(2) notices cannot transform its unreasonable practice of initiating purges based

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November 2, 2010, https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/voter-turnout-november-2-2010.

[13] *2016 Official Elections Results*, *supra* note 11; *2012 Elections Results*, *supra* note 11.

[14] *2014 Elections Results*, *supra* note 12; *Voter Turnout*, *supra* note 12.

on the failure to vote in a single federal election cycle into a reasonable one.[15]

3. The Supplemental Process has had harmful consequences for Ohio's conduct of federal elections and for voters. First, thousands of voters were deregistered even though they had not moved and remained eligible to vote. The Secretary concedes that at least 7,515 citizens were struck from the rolls despite not moving; these voters had to cast provisional ballots in the 2016 election. Pet. Br. 14. Yet, the real toll is likely much greater. Records from just *two* of Ohio's 88 counties show that 66,570 registrants were removed from the rolls due to the Supplemental Process. Bell Decl., R. 9-1, ¶¶ 10, 14, PageID 69-70. And there is no way to know how many still-eligible voters who had been deregistered did not cast a provisional ballot because they did not know they were entitled to do so or were improperly

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[15] Ohio's deficient notice violates a separate provision of the NVRA. As the Sixth Circuit held, Ohio's notices were "blatantly non-complian[t] with the NVRA," Pet. App. 28a, which requires any Section 8(d)(2) notice to have the "effect" of informing the registrant that "[i]f the card is not returned . . . , and if the registrant does not vote in [the next two federal elections,] the registrant's name will be removed from the list of eligible voters." 52 U.S.C. § 20507(d)(2). Deficient notice of intent to purge is among the practices Congress targeted with Section 8. *See Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 206-07 (1989) (testimony of Deborah Karpatkin, Legal Dir., Human Serve) (describing cases of New York City voters who had voted in prior elections but were nevertheless purged without warning); *id.* at 149 (statement of Nancy M. Neuman, President, League of Women Voters) (State procedures to purge voters for not voting "strike hardest at those who may not receive notification that their names have been removed.").

denied a provisional ballot by confused poll workers. As the Presidential Commission on Election Administration has observed, "poll workers unaware of various legal requirements, such as those governing provisional ballots, may unintentionally turn away eligible voters." *See* Presidential Comm'n on Election Admin., *The American Voting Experience* 48 (2014). And even if Petitioner's number is correct, depriving 7,515 eligible citizens of their fundamental right to vote based on their lawful choice not to vote in a prior election is exactly what the NVRA was intended to prevent.

Second, Ohio's practice promotes confusion on election day. The Secretary concedes that thousands of people showed up to vote who were not aware they had been deregistered through the Supplemental Process. Pet. Br. 14. Poll workers had to take time to confirm that those people were not on the rolls, to figure out why not, to explain the situation to them, and to offer them a provisional ballot. *See* Pet. App. 94a-100a. Because people who turn out to vote but are not on the rolls require more time and attention from poll workers, they lengthen the lines and wait times for *all* voters. Presidential Comm'n on Election Admin., The American Voting Experience 25 (2014). Longer lines and wait times can lead would-be voters to give up, and discourage others from turning out at all. *See, e.g.*, U.S. Gov't Accountability Off., GAO-14-850, Elections: Observations on Wait Times for Voters on Election Day 2012 26 & n.52 (2014).

This result flies in the face of "the duty of the Federal, State, and local governments to promote the exercise of th[e] right [to vote]" and the NVRA's purpose of "enhanc[ing] the participation of eligible

citizens as voters in elections for Federal office." 52 U.S.C. § 20501(a)(2), (b)(2).

4. Several of Petitioner's amici (but not Petitioner himself) assert that deregistering a voter for failure to vote is somehow justified on the theory that it prevents voter fraud. *See, e.g.*, Judicial Watch Br. 19-20; American Civil Rights Union Br. 13; Landmark Legal Found. Br. 13. No evidence bears out that argument. A broad sweep that starts with all individuals who did not vote (based on the unreasonable inference that people who do not vote must be ineligible to vote) is not a reasonable way to target individuals who may attempt to vote fraudulently. That petitioners' *amici* repeatedly invoke an overstated and theoretical risk does not make it true. And those unsubstantiated concerns certainly do not make Ohio's program reasonable.

B. No Other State Uses Practices as Unreasonable as Ohio's to Deregister Voters.

States have adopted a wide array of practices to remove the names of ineligible voters from the rolls. Petitioner and several of his *amici* suggest that Ohio's Supplemental Process is not unreasonable because it is similar to other states' practices.[16] No other state, however, has a practice as ham-handed and draconian as Ohio's Supplemental Process.

A survey of other state practices reveals that no other state expressly uses the failure to vote in a *single* federal election cycle as the trigger to send a Section 8(d)(2) notice.

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[16] *See* Pet. Br. 56-57; United States Br. 32-33; Judicial Watch Br. 15-18; American Civil Rights Union Br. 12-13; Landmark Legal Found. Br. 10-12; The Buckeye Inst. Br. 8.

Thirty-eight other states (and the District of Columbia) have established practices that, unlike Ohio's Supplemental Process, use independent information that an individual has moved—not an individual's failure to vote—as a trigger to send a Section 8(d)(2) notice.[17] These states are identified in the Appendix.

Their processes include:

- Consultations with other agencies in the state. State election officials often have information-sharing agreements with other state agencies to identify individuals who may have moved or died. *See, e.g.*, Ind. Code § 3-7-38.2-2 (election officials informed of returned jury notices); N.Y. Elec. Law § 5-712 (election officials receive information from federal, state or local government agencies); Wash. Rev. Code § 29A.08.620 (election officials receive information from Department of Licensing or other agency).
- Information-sharing agreements with other states. Many states (including Ohio) collaborate to pool information from their various agencies to compare voter records across states for evidence that an individual has moved from one jurisdiction to another. *See, e.g.*, Electronic Registration Information Center (ERIC), http://www.ericstates.org/faq (a non-profit organization (consisting of 20

[17] In addition to these thirty-nine jurisdictions, six states either do not have a voter registration requirement (North Dakota) or permit registration at the polls on Election Day (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming), and are thus exempt from the NVRA. 52 U.S.C. § 20503(b).

states and the District of Columbia) that aggregates data from its members and submits a report to each state showing "voters who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered"); Del. Code tit. 15, § 1704(a) ("The Department may use a list of persons registered to vote in Delaware and who are registered to vote in another state or who have obtained a Driver's License or state ID card from another state as a source to send an address verification request to those voters."); Va. Code § 24.2-404.4 ("Department of Elections shall request voter registration information . . . from the states bordering the Commonwealth" and "utilize data regarding voter registration . . . received through list comparisons with other states").

- Other election-related mailings. Certain states send mailings to all registered voters or use information about non-delivered or returned mail to identify individuals who may have moved. *See, e.g.*, Ala. Code 1975 § 17-4-30(a) (nonforwardable mailing to all registered voters every four years); Ariz. Rev. Stat. § 16-166(A) (any returned election related mail); Cal. Elec. Code § 2225 (returned voter notification card); Colo. Rev. Stat. § 1-2-605 (1) (returned election-related mail); Ind. Code § 3-7-38.2-2 (returned election-related mail); Kan. Stat. § 25-2316c(e) (returned election-related mail); Neb. Rev. Stat. § 32-329 (biennial mailing of a nonforwardable

notice to each registered voter); N.M. Stat. 1-4-28 (returned election-related mail).

- Canvass of all registered voters. Certain states canvass all of their voters to determine if they have moved. *See* Conn. Gen. Stat. § 9-32; Mass. Gen. Laws Ch. 51, § 37.

- Postal Service Information. Virtually every state, including Ohio, *see* Ohio Rev. Code § 3503.21(B)(1), uses information from the Postal Service's National Change of Address Program to identify individuals who have indicated they have moved. *See, e.g.*, Ariz. Rev. Stat. § 16-166(E); Cal. Elec. Code § 2225; Del. Code tit. 15, § 1704; Ind. Code § 3-7-38.2-2; Kan. Stat. § 25-2316c(e); Mich. Comp. Laws § 168.509aa; Md. Code Elec. Law § 3-502(b); Neb. Rev. Stat. § 32-329; N.J. Stat. § 19:31-15; Va. Code § 24.2-428.[18]

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[18] The former Department of Justice lawyers supporting Petitioner argue that "[w]hen they were serving in the Civil Rights Division, the Justice Department required states to adopt procedures that are indistinguishable from Ohio's Supplemental Process." *See* Former Att'ys of the Civil Rights Div. Br. 13-14 (emphasis omitted). But the three referenced consent decrees, all of which are over a decade old, do not reflect current State practices. Nor are they indistinguishable from Ohio. For example, the Indiana consent decree did not require Indiana to send Section 8(d)(2) notices to only voters that failed to vote, but instead ordered Indiana first to make "*reasonable efforts* to identify" ineligible voters, "by conducting a statewide mailing . . . via first class non-forwardable mail, to *all registered voters*." Consent Decree and Order, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006) (emphasis added).

- Two-step process. Several states use a two-step mailing process for sending a Section 8(d)(2) notice. If an individual has not voted in a specified number of elections, election officials send a non-forwardable notice to that voter; if that notice is returned as undeliverable, only then do these states send a Section 8(d)(2) notice.[19] *See* Alaska Stat. § 15.07.130(a); Fla. Stat. § 98.065(2); 29-250-505 Me. Code R. § 1; Mont. Code § 13-2-220(1); 17 R.I. Gen. Laws § 17-9.1-27(b); S.D. Codified Laws § 12-4-19.

These other state practices demonstrate states can undertake efforts to clean their rolls without adopting a policy like Ohio's Supplemental Process.

Only five other states (Georgia, Oklahoma, Oregon, Pennsylvania, and West Virginia) expressly use failure to vote as a trigger for deregistration at all. All provide for more protection than Ohio to prevent deregistration of eligible voters. Unlike Ohio, none of these states sends a Section 8(d)(2) notice after an individual fails to vote in a *single* federal election cycle. *See* Ga. Code § 21-2-234(a) (three years); Okla.

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[19] Unlike Ohio, the failure of a voter to respond to the initial mailing in these states does not lead to deregistration, and no 8(d)(2) notice is sent, nor is any further action taken. *Amicus* Judicial Watch incorrectly states that these states use practices similar to Ohio's because they "use the failure to vote . . . as a basis for sending . . . targeted mailings . . . ." Judicial Watch Br. 15-18. On the contrary, unlike Ohio, these states do not require election officials to send a Section 8(d)(2) notice for a single failure to vote. Instead, the deregistration process is initiated only *after* the election official has specific information that the voter has moved: the nonforwardable notice is returned as undeliverable.

Stat. tit. 26, § 4-120.2 (two general elections); Or. Rev. Stat. § 247.296 (five years); 25 Pa. Cons. Stat. § 1901(b)(3) (five years); W.V. Code § 3-2-25(j) (four years).[20] This is especially significant in light of the fact that Ohio is the only state to have sent notices that a court found insufficient to inform voters that if they do not respond to the notice and continue not to vote, they will be deregistered.

The above survey of other state practices reveals what *amici* in support of Petitioner attempt to obscure: that no other state has implemented a process as aggressive or unreasonable as Ohio's Supplemental Process. Ohio's Supplemental Process is the opposite of a "best" practice. American Civil Rights Union Br. 12. Other states have not and will not be "hamstrung" if Ohio's Supplemental Process is confirmed to violate the NVRA. Landmark Legal

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[20] Although the United States points to these states to suggest that Ohio's Supplemental Process is reasonable, United States Br. 32-33, the United States does not acknowledge that all of these states provide for a longer period of non-voting before notice is sent. Nor does the Department of Justice defend Ohio's "blatantly noncompliant" notice. And it should be noted that the United States took the contrary position in the Sixth Circuit, and has a long track record of telling states that practices similar to Ohio's violate the NVRA. *See* Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Mark Barnett, Att'y Gen. (S.D.) (Feb. 11, 1997), Ex. 2 to Brief of the United States Department of Justice as Amicus Curiae Supporting Plaintiffs-Appellants, *A. Philip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. 2016), ECF 29 ("DOJ Sixth Cir. Amicus Brief"); Letter from Pinzler to Bruce M. Botelho, Att'y Gen. (Alaska) (Feb. 11, 1997), Ex. 3 to DOJ Sixth Cir. Amicus Brief; Joint Stipulation to Substitute Language, Ex. 1 to DOJ Sixth Cir. Amicus Brief (stipulating to order requiring State to use undeliverable mail rather than failure to vote to trigger removal process).

Found. Br. 10. Nor is it "practically infeasible" for Ohio to use a different practice. The Buckeye Inst. Br. 8. Literally every other state uses a different, and more voter-protective, practice.

CONCLUSION

Ohio's Supplemental Process not only violates the NVRA prohibition against removing a lawful voter "by reason of the person's failure to vote," it is based on unreasonable and inaccurate inferences that deprive a significant number of voters of their right to vote, or not vote. This Court should affirm the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX

Jurisdictions that do not send 8(d)(2) notices solely by reason of failure to vote or are exempt from the NVRA

State	Basis for sending a (d)(2) notice
Alabama Ala. Code 1975 § 17-4-30	State sends a nonforwardable mailer to all registered voters every four years. If mailer is returned as undeliverable, the state sends a (d)(2) notice.
Alaska Alaska Stat. § 15.07.130	State sends a nonforwardable mailer to registered voters who have not voted in last two elections. If mailer is returned as undeliverable, the state sends a (d)(2) notice.
Arizona Ariz. Rev. Stat. § 16-166	State relies on (i) USPS information and (ii) a nonforwardable mailer sent to all registered voters; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Arkansas Ark. Const. amend. LI, § 10	State relies on (i) USPS information and (ii) "other unconfirmed data indicating that a registered voter no longer resides at his or her registered address."
California Cal. Elec. Code §§ 2220, 2225	State relies on (i) USPS information and (ii) a nonforwardable mailer sent to all registered voters; if mailer is returned as undeliverable, the state sends a (d)(2).

Colorado Colo. Rev. Stat. §§ 1-2-302.5, 1-2-605	State relies on (i) USPS information and (ii) election-related mail that is returned as undeliverable.
Connecticut Conn. Gen. Stat. § 9-32	State relies on annual canvass of all registered voters, which can either be conducted (i) house to house; (ii) by mail using USPS information; (iii) by telephone; or (iv) through a combination of the above methods.
District of Columbia D.C. Code § 1-1001.07	District sends a nonforwardable mailer to registered voters who have not confirmed address through the voting process. If mailer is returned as undeliverable, the state sends a (d)(2) notice.
Delaware Del. Code tit. 15, § 1704	State relies on information identifying voters that have (i) registered to vote in another state or (ii) obtained a driver's license or state idenfication card in another state.

Florida Fla. Stat. § 98.065	State relies on (i) USPS information, (ii) election-related mail returned as undeliverable, (iii) returned jury notices, (iv) information from the department of highway safety and motor vehicles, (v) information "from other sources which indicates that a registered voter's legal residence might have changed," or (vi) a nonforwardable mailer sent to all registered voters who have not voted in the last two years; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Hawaii Haw. Code R. § 3-172-28	State relies on "information from the courts, the department of health, utility companies, condominium and apartment associations, and other agencies."
Idaho Idaho Code § 34-408(3)	State permits registration at the polls on Election Day, and is thus exempt from the NVRA.
Illinois Ill. Admin. Code tit. 26, § 216.50	State relies on USPS information.

Indiana Ind. Code § 3-7-38.2-2	State explicitly prohibits removal of the name of a person from the official list of voters solely due to the person's failure to vote. State relies on (i) USPS information, (ii) court-returned jury notices, (iii) election-related mail returned as undeliverable, or (iv) information from the bureau of motor vehicles.
Iowa Iowa Code §§ 48A.28, 29	State sends a forwardable mailer either to all registered voters or each registered voter whose name was not reported by the national change of address program and who has not voted in two or more consecutive elections. If mailer is returned as undeliverable, the state sends a (d)(2) notice.
Kansas Kan. Stat. §§ 2316c, 25-2354	State relies on (i) USPS information or (ii) "mass or targeted mailings to registered voters"; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Kentucky Ky. Rev. Stat. § 116.112	State relies on (i) USPS information or (ii) "other sources to identify voters whose addresses may have changed."
Louisiana La. Stat. § 18:193	State sends (d)(2) notices "[w]hen the registrar has reason to believe that . . . a registrant has changed his residence . . . ."

Maine 29-250-505 Me. Code R. § 1	State relies on (i) USPS information and (ii) a nonforwardable mailer sent to all registered voters or registered voters who did not vote in the most recent election; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Maryland Md. Code Ann., Elec. Law § 3-502	State relies on (i) "any information that a voter currently registered in the State has moved to a different address within the State," or (ii) USPS information "that a voter has moved to a different address outside the State."
Massachusetts Mass. Gen. Laws ch. 51, §§ 4, 37	State relies on annual canvas of all residents.
Michigan Mich. Comp. Laws § 168.509aa	State relies on (i) USPS information or (ii) "other reliable information received by the clerk that identifies registered voters whose addresses may have changed."
Minnesota Minn. Stat. § 201.061 subd. 3	State permits registration at the polls on Election Day, and is thus exempt from the NVRA.
Mississippi	State does not have any specific statutory provisions for what information is relied on to send a (d)(2) notice.

Missouri Mo. Stat. §§ 115.181, 115.187	State relies on a statewide canvass every two years made house-to-house, through the USPS, or by both methods, and the canvass may be made by including only those voters who did not vote at the last general election.
Montana Mont. Code § 13-2-220	State relies on (i) USPS information, (ii) nonforwardable mailer sent to all registered voters, or (iii) attempts to contact voters who failed to vote in the previous federal general election through either a forwardable or nonfowardable notice or door-to-door canvass. If any mailer is returned as undeliverable or the voter fails to respond, the state sends a (d)(2) notice.
Nebraska Neb. Rev. Stat. § 32-329	State explicitly prohibits removal of a voter for the sole reason that the person has not voted for any length of time. State relies on (i) USPS information or (ii) a nonforwardable mailer sent to all registered voters every other year; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Nevada Nev. Rev. Stat. § 293.530	State relies on (i) USPS information or (ii) investigations by census, by house-to-house canvass or "by any other method."

New Hampshire N.H. Stat. 654:7-a	State permits registration at the polls on Election Day, and is thus exempt from the NVRA.
New Jersey N.J. Stat. § 19:31-15	State relies on USPS information.
New Mexico N.M. Stat § 1-4-28	State relies on (i) USPS information, (ii) election related mail that is returned as undeliverable, or (iii) periodic mailings to voters to verify continued residency.
New York N.Y. Elec. Law § 5-712	State relies on (i) USPS information, (ii) information from any federal, state or local government agencies, or (iii) election-related mail that is returned undeliverable.
North Carolina N.C. Gen. Stat. § 163-82.14	State relies on (i) USPS information or (ii) "data sharing agreements with other states to cross-check information on voter registration and voting records." The state will send a (d)(2) notice after congressional elections if the voter's address has not been confirmed by other means.
North Dakota	State does not require voter registration, and is thus exempt from the NVRA.

Rhode Island 17 R.I. Gen. Laws § 17-9.1-27	State relies on (i) USPS information or (ii) nonforwardable mailers sent to registered voters who have not voted in the past five years; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
South Carolina	State does not have any specific statutory provisions for what information is relied on to send a (d)(2) notice.
South Dakota S.D. Codified Laws § 12-4-19	State relies on (i) USPS information or (ii) a nonforwardable mailer sent to registered voters who have not voted in last four years; if mailer is returned as undeliverable, the state sends a (d)(2) notice.
Tennessee Tenn. Code § 2-2-106	State relies on (i) USPS information, (ii) election related mail that is returned as undeliverable, or (iii) information from the department of safety.
Texas Tex. Elec. Code § 15.051	State sends a (d)(2) notice "[i]f the registrar has reason to believe that a voter's current residence is different from that indicated on the registration records."
Utah Utah Code § 20A-2-305	State explicitly prohibits removal of a voter because the voter has failed to vote in an election. State relies on "evidence the voter's residence has changed."

Vermont Vt. Stat. tit. 17, § 2150	State relies on an inquiry to determine with certainty the voters eligibility, including using (i) official and unofficial public records and documents, (ii) tax records, (iii) checklists showing voter voted in any election within the last four years, or (iv) attempts to contact voters.
Virginia Va. Code §§ 24.2-404.4, 24.2-428	State relies on (i) USPS information, (ii) voter registration information from bordering states, or (iii) "other reliable sources to identify voters whose addresses may have changed."
Washington Wash. Rev. Code § 29A.08.620	State relies on (i) USPS information, (ii) information from the Department of Licensing, or other agency designated to provide voter registration services, or (iii) election-related mail returned as undeliverable.
Wisconsin Wis. Stat. § 6.55	State permits registration at the polls on Election Day, and is thus exempt from the NVRA.
Wyoming Wyo. Stat. § 22-3-102(a)	State permits registration at the polls on Election Day, and is thus exempt from the NVRA.

Jurisdictions that send 8(d)(2) notices by reason of failure to vote

State	Basis for sending a (d)(2) notice
Georgia Ga. Code § 21-2-234	If voter has not voted in three years (or otherwise contacted election officials), state sends (d)(2) notice. State also relies on election mail returned as undeliverable.
Ohio Ohio Rev. Code § 3503.21	If voter did not vote in last election, state sends a (d)(2) notice. State also relies on USPS information.
Oklahoma Okla. Stat. tit. 26, § 4-120.2	If voter has not voted in two general elections (or otherwise had contact with election officials), state sends a (d)(2) notice. State also relies on (i) election related mail returned as undeliverable, (ii) voter registration information from other states, or (iii) information from the Department of Public Safety.
Oregon Or. Rev. Stat. §§ 247.296, 247.563	If voter has not voted in five years, state sends a (d)(2) notice. State also relies on (i) USPS information or (ii) other "evidence from the elector or another county clerk indicating a change of residence or mailing address."
Pennsylvania 25 Pa. Cons. Stat. § 1901	If voter has not voted in five years (or otherwise had contact with election officials), state sends a (d)(2) notice. State also relies on (i) USPS information and (ii) door-to-door canvass.

West Virginia W. Va. Code § 3-2-25	If voter has not voted in four years (or otherwise had contact with election officials), state sends a (d)(2) notice. State also relies on (i) USPS information, (ii) information from the DMV and other state agencies, or (iii) comparison of voter registration information of all counties.

RECORD AND BRIEFS.

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No. 16-980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE; NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Bauer v. *Souto*, 896 A.2d 90 (Conn. 2006) 17

Beare v. *Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971) 16

Boy Scouts of America v. *Dale*, 530 U.S. 640 (2000) 3, 10, 11

Burdick v. *Takushi*, 504 U.S. 428 (1992) 2, 7, 18, 19, 22

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 11

Clingman v. *Beaver*, 544 U.S. 581 (2005) 2

Crawford v. *Marion County Election Board*, 553 U.S. 181 (2008) 19, 22

Dixon v. *Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989) 17

Doe v. *Reed*, 561 U.S. 186 (2010) 8

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) 5

Faretta v. *California*, 422 U.S. 806 (1975) 10

TABLE OF AUTHORITIES—Continued

Page(s)

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 6, 9

Galli v. *New Jersey Meadowlands Commission*, 490 F.3d 265 (3d Cir. 2007) 17

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 6

Harper & Row Publishers, Inc. v. *Nation Enterprises*, 471 U.S. 539 (1985) 11

Hurley v. *Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) 11, 12

Illinois Board of Elections v. *Socialist Workers Party*, 440 U.S. 173 (1979) 5

In re Hickenlooper, 312 P.3d 153 (Colo. 2013) 17

Kramer v. *Union Free School District No. 15*, 395 U.S. 621 (1969) 6

Lane v. *Wilson*, 307 U.S. 268 (1939) 6

Lubin v. *Panish*, 415 U.S. 709 (1974) 7

McCreary County v. *ACLU*, 545 U.S. 844 (2005) 12

McCutcheon v. *FEC*, 134 S. Ct. 1434 (2014) 5, 78

McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 10

Michigan State UAW Community Action Program Council v. *Austin*, 198 N.W.2d 385 (Mich. 1972) 14, 16

Munro v. *Socialist Workers Party*, 479 U.S. 189 (1986) 2

Norman v. *Reed*, 502 U.S. 279 (1992) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Obergefell v. *Hodges*, 135 S. Ct. 2584 (2015) 10

Partnoy v. *Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003) 17

Reynolds v. *Sims*, 377 U.S. 533 (1964) 6

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 11

Roth v. *United States*, 354 U.S. 476 (1957) 8

Storer v. *Brown*, 415 U.S. 724 (1974) 7

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 7

Torcaso v. *Watkins*, 367 U.S. 488 (1961) 12

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) 12

United States v. *Classic*, 313 U.S. 299 (1941) 6

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 8

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 10, 12

Washington State Grange v. *Washington State Republican Party*, 552 U.S. 442 (2008) 2

Wesberry v. *Sanders*, 376 U.S. 1 (1964) 9

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 9, 12

Williams v. *Rhodes*, 393 U.S. 23 (1968) 3, 7

Wooley v. *Maynard*, 430 U.S. 705 (1977) 10, 12

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TABLE OF AUTHORITIES—Continued

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LEGISLATIVE MATERIALS

S. Rep. No. 103-6 (1993) 18

139 Cong. Rec.
2427 (Feb. 4, 1993) 18
4789 (Mar. 11, 1993) 18
9204 (May 5, 1993) 18

OTHER AUTHORITIES

Blocher, Joseph, *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1 (2012) 10

Blomberg, Jeffrey A., *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 Fordham L. Rev. 1015 (1995) 14

Charles, Guy-Uriel E., *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209 (2003) 7

Cummings, Mike, *Q&A with Eitan Hersh: how campaigns use data to target voters*, Yale News (Aug. 13, 2015), https://news.yale.edu/2015/08/13/qa-eitan-hersh-how-campaigns-use-data-target-voters 20

TABLE OF AUTHORITIES—Continued

Page(s)

Desilver, Drew, *U.S. trails most developed countries in voter turnout*, Pew Research Center (May 15, 2017), http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/ 14

Enelow, James M. & Melvin J. Hinich, *The Spatial Theory of Voting: An Introduction* (1984) 14

FairVote, *The Rise of Safe Seats? The Relative Impact of Redistricting and "The Big Sort"* (Nov. 2013), https://fairvote.app.box.com/v/Redistricting-2014 15

Gallup News, *What is the difference between registered voters and likely voters?*, http://news.gallup.com/poll/110287/what-difference-between-registered-voters-likely-voters.aspx (visited Sept. 22, 2017) 21

Hellman, Jessie, *Poll: Majority of voters want Johnson on debate stage*, The Hill (Aug. 25, 2016), http://thehill.com/blogs/ballot-box/presidential-races/293324-poll-majority-of-voters-want-johnson-on-debate-stage 21

Lieb, David A., *Democracy with no choices: Many candidates run unopposed*, Denver Post, June 25, 2017, *available at* http://www.denverpost.com/2017/06/25/candidates-run-unopposed-voting/ 15

Meiklejohn, Alexander, *Free Speech and Its Relation to Self-Government* (1948) 3, 6

TABLE OF AUTHORITIES—Continued

Page(s)

Nonprofit Vote, *America Goes To The Polls 2016*, http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf (last visited Sept. 22, 2017) 15

Ohio Secretary of State, *Voter Files Download Page*, https://www6.sos.state.oh.us/ords/f?p=111:1 (last visited Sept. 22, 2017) 14

Wasserman, Howard M., *Compelled Expression and the Public Forum Doctrine*, 77 Tul. L. Rev. 163 (2002) 13

Winkler, Adam, *Expressive Voting*, 68 N.Y.U. L. Rev. 330 (1993) 8

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTEREST OF AMICUS CURIAE[1]

The Libertarian Party, the third-largest political party in the United States, was founded in 1971 to promote the principles of liberty set forth in the Declaration of Independence and United States Constitution. The Libertarian Party's interests are frequently implicated by state election laws, including those that burden candidates and voters for disapproving or straying outside of the Democratic and Republican duopoly. Accordingly, the Libertarian Party and its state affiliates

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus briefs in this case are on file with the Clerk.

have repeatedly presented their views on such issues to this Court, both as a party (for example, in *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442 (2008), and *Clingman* v. *Beaver*, 544 U.S. 581 (2005)) and as an amicus (for example, in *Burdick* v. *Takushi*, 504 U.S. 428 (1992), *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983)).

The Libertarian National Committee's interest in this case is twofold.

First, this case implicates the Libertarian Party's cherished values. The Party's core commitment is to individual liberty; it opposes government rules and restrictions that burden liberty, and it seeks to advance legal rules that promote individual freedom, including in the political realm. Here, Ohio has implemented a rule that punishes voters who choose not to vote. Government should not be in the business of burdening or disadvantaging citizens based on their political activities or their principled decisions about how to engage in democracy.

Second, the Ohio rule at issue here disproportionately burdens the rights of Libertarian Party supporters and others who are unhappy with the choices provided by the two-party system. Libertarian Party members and voters are particularly likely to engage in principled non-voting in cases where a particular election, or even election cycle, does not include any Libertarian Party candidates. The Ohio rule at issue here removes Libertarian Party voters from the rolls who engage in that form of political expression, stymieing their ability to participate in politics in myriad ways.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises under the National Voter Registration Act. But the Ohio policy at issue—a "use-it-or-lose it" rule whereby a registered voter is deemed "inactive," commencing a process that can result in the voter being purged from the voter rolls, because he or she did not vote during a single election cycle—also raises serious constitutional concerns. The Ohio policy is inconsistent with constitutional principles because it burdens a registered voter's principled decision *not* to cast a ballot—a right that sounds in the First Amendment.

This Court has long acknowledged that in our unique form of self-government, voting implicates First Amendment principles. *See, e.g.*, *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). Indeed, the First Amendment's protections are particularly important in the context of political freedoms and core acts of political expression. *See, e.g.*, Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (1948). Moreover, First Amendment rights typically are bilateral, encompassing both the right to engage in protected activity *and* the right to refrain from it. *See, e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-648 (2000). That is true for the right not to vote. Voters can and do make principled, political decisions to sit out particular election cycles based on their political beliefs. They may do so to express disapproval with the candidates or with the process. Commencing a process to remove voters from the rolls because they did not vote in a single election cycle undermines voters' ability to take this type of political action, penalizes them for their acts of political expression, and is akin to forced political activity.

Ohio's policy severely burdens voters' political rights. Ohio's rule means that principled non-voters—citizens who register their displeasure with the lack of choices presented in particular election cycles by not voting, including citizens who are members or supporters of "third parties" like the Libertarians—can ultimately be purged from the voter rolls by the State for expressing their political views. The voter is first formally marked as "inactive" for not voting in a single election. After that, the voter will be sent a confirmation card by the State at whatever address the State has on file for that voter. Whether or not the voter actually receives the card,[2] if the voter has not either returned it, or voted, by the end of the subsequent two election cycles, the voter is purged from Ohio's voter registration file.

The harms flowing from Ohio's rule are significant. Once removed from the rolls, the now-unregistered voter is ineligible to sign ballot access petitions under state law (*i.e.*, unable to help their preferred candidates, parties, and initiatives make it onto the ballot in future elections), unable to be identified and contacted by candidate campaigns that rely on the state's voter registration records, and invisible to pollsters and others who measure public opinion by seeking the views of registered voters.

Ohio's "use-it-or-lose-it" rule tangibly and particularly disadvantages the State's "third-party" voters,

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[2] Ohio's reliance on mailed confirmation cards is inherently problematic. Among other things, there is no guarantee that the confirmation notice will ever be received. The likelihood of successful delivery is particularly low for certain groups—including, for example, homeless individuals. *See, e.g.*, Dist. Ct. Dkt. 9-3 ¶ 18 ("Homeless individuals often do not have an address where they can reliably receive mail[.]").

including supporters of the Libertarian Party (150,000 of whom voted for a Libertarian candidate for President in 2016 in Ohio alone). Limiting the political rights of certain voters because they have chosen to express disdain for a process that quite often, all the way down the ballot, offers too few meaningful choices, and that often disadvantages "third parties" in favor of the Democratic and Republican duopoly, is inconsistent with First Amendment principles.

This Court generally interprets statutes to avoid serious constitutional problems "unless [the] construction is plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), which is not the case here, as Congress believed that the National Voter Registration Act protected a citizen's principled decision not to vote in given elections. The potential conflict between Ohio's policy and fundamental First Amendment principles thus provides yet another reason to affirm the judgment below.

ARGUMENT

I. OHIO'S RULE SIGNIFICANTLY BURDENS PROTECTED POLITICAL ACTIVITY AND CONTRAVENES FIRST AMENDMENT PRINCIPLES

A. The First Amendment Protects The Right To Vote

The Constitution protects citizens' right to engage in political activity, including, and especially, the right to vote. This Court has repeatedly declared that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1440-1441 (2014) (plurality opinion); *see also, e.g., Illinois Bd. of Elec-*

tions v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964) ("[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); *United States* v. *Classic*, 313 U.S. 299, 318 (1941) (the Constitution guarantees "[t]he right to participate in the choice of representatives for Congress"). The right to vote, like the right to express one's political beliefs more broadly, "is personal"—a core aspect of individual freedom within our system of self-government. *Reynolds*, 377 U.S. at 561 (internal quotation marks omitted).

Multiple constitutional provisions help safeguard the basic right to participate in our political system. *E.g.*, *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (property requirement for participation in local elections struck down under Fourteenth Amendment); *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) (grandfather clause struck down under Fifteenth Amendment). But the First Amendment plays a particularly critical role. That is because freedom of expression, *especially* with respect to political matters, is a foundational element of democratic self-government. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 n.12 (1978) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964)). As Professor Meiklejohn famously wrote, "The principle of the freedom of speech springs from the necessities of the program of self-government." Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (1948) (cited in, *inter alia*, *Bellotti*, 435 U.S. at 777 n.11). Or, as Chief Justice Warren put it: "Our form of government is built on the premise that

every citizen shall have the right to engage in political expression and association." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-251 (1957) (plurality opinion).

Accordingly, this Court has acknowledged that the First Amendment protects the right to vote. *See Burdick* v. *Takushi*, 504 U.S. 428, 433-438 (1992) (recognizing First Amendment interest in the right to vote);[3] *Lubin* v. *Panish*, 415 U.S. 709, 722 (1974) (Douglas, J., concurring) ("[T]he right to vote in state elections is one of the rights historically 'retained by the people' by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights."); *Storer* v. *Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) ("The right to vote derives from the right of association that is at the core of the First Amendment[.]"); *cf. Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) (noting that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively" are "different, although overlapping, kinds of rights"); Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1255 & n.260 (2003) ("[T]he First Amendment protects an indi-

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[3] *Burdick* explained that strict scrutiny is not the appropriate analysis for every state law governing the electoral process. 504 U.S. at 433, 438 (noting that "the right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute" and that "[a]ttributing to elections a more generalized expressive function" such that strict scrutiny would apply in all cases "would undermine the ability of States to operate elections fairly and efficiently"). But amicus's argument here does not depend on the application of strict scrutiny. Indeed, under the flexible *Anderson-Burdick* framework, *id.* at 434, the burdens placed on the right to vote by Ohio's rule are substantial and not justified. *See infra* Part I.C.

vidual's right to associate politically through the vote and otherwise.") (collecting cases).[4]

Importantly, this Court has also acknowledged that the right to vote is a First Amendment concern in no small part *because* voting and participation in the electoral process are acts of fundamental political expression and association. *See, e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 787-788 (1983) ("The exclusion of candidates ... burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."); *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (explaining that there is a "First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"); *see also* Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 333 (1993) (explaining that voting is "essentially an expressive exercise" and that "[b]y

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[4] Furthermore, because the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U.S. 476, 484 (1957), and its protections "safeguard[] an individual's right to participate in the public debate through political expression and political association," *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion), this Court has similarly applied its protections to activities beyond voting that are intended to influence the outcome of elections. In addition to the aggregate limits on campaign contributions at issue in *McCutcheon*, *id.*, for example, this Court has concluded that "the compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment," *Doe* v. *Reed*, 561 U.S. 186, 194 (2010), and that the First Amendment protects the "right of citizens to create and develop new political parties," *Norman* v. *Reed*, 502 U.S. 279, 288 (1992).

voting, the individual shows something of herself, displaying desires, beliefs, judgments, and perceptions"); *cf. Bellotti*, 435 U.S. at 777 nn.11-12 (discussing connection between freedom of expression and association and self-government, and citing authorities).[5]

In sum, the right to vote and the right to freedom of expression and association converge around the same basic prerogatives: In our form of government, all citizens are given wide latitude to express their political views, and are entitled to "hav[e] a voice in the election of those who make the laws." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

B. The First Amendment Likewise Protects The Right Not To Vote

The right to vote in turn encompasses the right *not* to vote. Just as the right to vote gives each citizen a voice in deciding for themselves which candidates best reflect their values, that right necessarily implies a corollary right to decide that *no* candidate reflects their values (or for that matter, that the entire selection process was insufficient and flawed). According citizens a meaningful voice in our democracy means respecting their right to choose not to vote as a matter of principled belief and free political expression and as a statement of political identity.

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[5] First Amendment protection for the right to vote is also consistent with this Court's longtime recognition that the First Amendment carves out a "sphere of intellect and spirit" that is protected from "official[s], high or petty, ... prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The fundamental individual autonomy safeguarded by the First Amendment is nowhere more important than in matters of self-government and political expression. *See supra* pp. 6-7.

1. The First Amendment safeguards a citizen's personal choice of whether to engage in protected activity

First Amendment rights typically include the right to engage or not engage in protected activities. An individual enjoys not just the ability to associate with others, but also the "'freedom *not* to associate.'" *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000) (emphasis added). He or she has the right not just "to speak freely," but also to "refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). He or she has the right to worship as he or she chooses, which includes within it the right not to worship. *Wallace* v. *Jaffree*, 472 U.S. 38, 53 (1985).[6]

That makes sense, because individual free will and freedom of choice are "at the heart of the First Amendment." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *see also, e.g.*, *Faretta* v. *California*, 422 U.S. 806, 833-834 (1975) ("[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." (citing U.S. Const. amend. I)); *cf.* Blocher, *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1, 18 (2012) (arguing that a so-called "'choice right'" "arise[s] where the constitutional values under-

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[6] The same is true of rights guaranteed by other provisions of the Constitution. For example, individuals have a right to counsel in criminal proceedings, but also a right to refuse counsel and appear *pro se* instead. *See McKaskle* v. *Wiggins*, 465 U.S. 168, 176-177 (1984) (right to proceed *pro se* "exists to affirm the dignity and autonomy of the accused"); *Faretta* v. *California*, 422 U.S. 806, 834 (1975) ("The right to defend is personal."). They have the right to decide not just whom to marry, but also *whether* to marry at all. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015) (describing such "personal choices" as "central to individual dignity and autonomy").

lying the right are furthered by protecting the decision *whether* to engage in the enumerated activity, and not simply by protecting the activity itself").

This Court has illustrated the point again and again, in the context of the First Amendment rights to freedom of association, freedom of speech, and freedom of religion.

With respect to freedom of association, it has explained that the First Amendment "protects 'the freedom to join together in furtherance of common political beliefs,'" but further noted that "a corollary of the right to associate is the right not to associate." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574-575 (2000); *see also Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). This established corollary right not to associate is premised on the First Amendment's bedrock concern: freedom from governmental coercion in any form. *See Boy Scouts of Am.*, 530 U.S. at 648 ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").

This Court has been equally clear that freedom of speech includes the freedom to be silent: "[O]ne who chooses to speak may also decide what not to say[.]" *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted); *see also Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985) ("'[F]reedom *not* to speak publicly ... serves the same ultimate end as freedom of speech in its affirmative aspect.'"). Here, too, the freedom *not* to act is grounded in the First Amendment's underlying concern for "'individual free-

dom of mind.'" *Wooley*, 430 U.S. at 714; *accord Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). Indeed, the freedom not to speak protects "the autonomy to choose the content of [one's] own message," *Hurley*, 515 U.S. at 573, because for some citizens, and in some contexts, silence is the most salient message. *E.g.*, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 646 (1943) (upholding the "freedom ... to be vocal or silent according to [one's] conscience or personal inclination").

Likewise, with respect to the freedom of religion, this Court has expressly held that the First Amendment must "embrace[] the right to select any religious faith or none at all." *Wallace*, 472 U.S. at 53. Here too, the freedom of conscience required by the First Amendment allows nothing less than complete freedom of choice—including the freedom to choose nothing at all. *See, e.g.*, *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 876 (2005) (First Amendment "protect[s] the integrity of individual conscience in religious matters"); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (First Amendment prevents government from "forc[ing] a person 'to profess a belief or disbelief in any religion'").

First Amendment freedoms—to associate, to speak, to worship—are premised on the individual's fundamental freedom of conscience, and such freedom is violated not only by denying an individual the right to engage in those activities, but also by *compelling* him or her to do so. The underlying principle is beyond cavil: "[I]n a free society one's beliefs should be shaped

by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 235.[7]

2. First Amendment freedoms include the right to engage in principled non-voting

Just as it does in the contexts of association, speech, and religion, the First Amendment's fundamental protection of freedom of conscience amply supports a right not to vote as a corollary to the established right to vote. As amicus knows well, voters may have many reasons to engage in principled non-voting, *i.e.*, to intentionally abstain from the electoral process for a given election. Coercing them to vote, on pain of losing their registration and other valuable political rights if they choose to abstain from the electoral process, *see infra* Part I.C, is as antithetical to First Amendment principles as forced speech or association. *Cf. Abood*, 431 U.S. at 235.

When a registered voter shows up to the polls and casts a ballot, he or she is expressing some measure of support for the electoral process and the choices offered on that particular ballot. Even if voters secretly undervote or even turn in a blank ballot, they are making their presence known to the local community, *see* Ohio Rev. Code §§ 3501.01(R), 3501.18(A), 3501.29(A) (providing that Ohio voters must generally appear and vote in person at a particular, designated "public building[]" in their local community), and the fact of their vote will be made public in the voter file, *see id.* § 3503.15(G)(1)(a)(iv) ("voter's voting history" is public-

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[7] *See also, e.g.*, Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 Tul. L. Rev. 163, 190 (2002) ("The protection against compelled expression is grounded primarily in concerns for individual liberty underlying freedom of speech.").

ly available on Secretary of State's website).[8] Oft-cited statistics on voter turnout will count them as participants in gauging the level of public support for the choices of candidates, parties, and policies offered by the electoral process.[9] In these ways, the act of voting itself constitutes core political expression. *See also supra* Part I.A.

Non-voting similarly can be a principled, core act of political expression. An otherwise engaged voter might choose to stay home to protest some perceived unfairness in the electoral process, to register his or her discontent with a narrow set of choices, or to express displeasure with the sheer number of uncontested or "safe" races.[10] Indeed, the latter phenomenon is empirically verifiable: Turnout drops off where races

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[8] *See also* Ohio Secretary of State, *Voter Files Download Page* (providing Ohio voter file including participation history for state elections going back to 2000), https://www6.sos.state.oh.us/ords/f?p=111:1.

[9] *See, e.g.*, Desilver, *U.S. trails most developed countries in voter turnout*, Pew Research Center (May 15, 2017) (measuring turnout based on voting age population and registered voters and explaining differences in metrics), http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/.

[10] *See, e.g.*, *Michigan State UAW Cmty. Action Program Council* v. *Austin*, 198 N.W.2d 385, 388 (Mich. 1972) (noting, in decision striking down voter purge law, that "there are numerous legitimate reasons why a voter might not vote," including as "a conscious protest against all of the candidates in a particular election"); Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 Fordham L. Rev. 1015, 1023 (1995) ("An alienated voter does not like any candidate enough to vote and thus abstains with a distinct purpose in mind. That purpose is to voice discontent with the system or with the choice of candidates presented by that system." (citing Enelow & Hinich, *The Spatial Theory of Voting: An Introduction* 90 (1984))).

are uncompetitive, as voters use their feet to express their displeasure.[11] That phenomenon has only become more salient as the number of "safe" (and often gerrymandered) legislative districts grows, and the number of truly competitive seats declines.[12]

Indeed, one of the respondents in this very case chose not to vote in the 2012 presidential election—a decision that commenced Ohio's punitive process and ultimately led to his removal from the voter rolls—for precisely this kind of principled reason. *See* Dist. Ct. Dkt. 9-4 ¶ 6 ("In 2012, I was disillusioned with the candidates and the political process, so I decided to abstain from voting, which was my own way of having my voice heard.").

Principled non-voting, *i.e.*, non-voting that expresses a message, is particularly familiar to amicus. Especially for voters who tend to support candidates outside of the two major parties, principled non-voting is a natural means of criticizing a political system whose rules often promote the Republican and Democratic duopoly at the expense of broader choices at the

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[11] *See, e.g.*, Nonprofit Vote, *America Goes To The Polls 2016* 6-7 (noting that "[a]mong the most common reasons voters cite for not voting are a lack of competition and meaningful choices on the ballot"), http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf.

[12] *See, e.g.*, Lieb, *Democracy with no choices: Many candidates run unopposed*, Denver Post, June 25, 2017 (noting that in 2016, 42 percent of all state legislative elections were uncontested in the general election), *available at* http://www.denverpost.com/2017/06/25/candidates-run-unopposed-voting/; FairVote, *The Rise of Safe Seats? The Relative Impact of Redistricting and "The Big Sort"* 1 (Nov. 2013) (charting decline of competition and rise of "safe, one-party" districts in congressional elections), https://fairvote.app.box.com/v/Redistricting-2014.

ballot box. For a registered Libertarian or other "third-party" supporter, principled non-voting may be an effective and clear way to protest unfair rules that prevent Libertarian or other candidates from being included in televised or broadcast debates, or ballot access rules that give major parties an automatic place on the ballot but make independent candidates and smaller parties work many times harder for the same privilege. Just as voting conveys, in myriad ways, baseline support for the electoral process, non-voting conveys dissatisfaction in a manner that is visible to community members, in the State's voter registration records, and in turnout statistics.[13] In short, and as explained in more detail below: It means something when a *registered voter* in particular chooses to stay home.

Consistent with that expressive meaning, courts explicitly have recognized a protected right not to vote. *See Michigan State UAW Cmty. Action Program Council* v. *Austin*, 198 N.W.2d 385, 387-388 (Mich. 1972) (striking down voter purge law based on constitutional "right not to vote"); *see also Beare* v. *Smith*, 321 F. Supp. 1100, 1102, 1103 (S.D. Tex. 1971) ("[I]t must be said that there is also a right not to vote."), *aff'd*, 498 F.2d 244 (5th Cir. 1974) (per curiam). Others have similarly acknowledged the right not to support particular

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[13] For this reason, it is no response to suggest that voters can simply come to the polls and cast a blank ballot. Doing so papers over the primary message of many principled non-voters; by casting a ballot, they show themselves at the polling place and are marked in the state's voter file as having participated in the electoral process, even though it is a process that they do not support. The fact that principled non-voters may send a partial, diluted version of their message by under-voting on the ballot does not ameliorate those basic problems. The Constitution provides them with more, *i.e.*, the right to send an unfiltered version of their political message without governmental interference or punishment.

candidates. *Dixon* v. *Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776, 782-783 (4th Cir. 1989) ("[T]he right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable."); *see also Galli* v. *New Jersey Meadowlands Comm'n*, 490 F.3d 265, 273 (3d Cir. 2007) ("A citizen's right not to support a candidate is just as relevant for First Amendment purposes as her right to support one."). Still others have held that a State may not restrict the right to vote based on non-participation in a previous election, because doing so would amount to compelled speech—also highlighting the expressive nature of the decision to vote or not to vote. *See In re Hickenlooper*, 312 P.3d 153, 158-159 (Colo. 2013) (holding that state law requirement providing that voter could only vote for successor in recall election if he or she had voted in earlier election "unconstitutionally compel[led] voters to express a view on the question of whether to recall an elected official, ... even if she categorically opposes the recall mechanism, or, more benignly, has no opinion on whether a candidate should be recalled"); *see also Partnoy* v. *Shelley*, 277 F. Supp. 2d 1064, 1071 (S.D. Cal. 2003) (reaching same conclusion with respect to state law that counted votes on question of who should succeed recalled state officer only if on the same ballot voter had also voted on the question of whether the officer should be recalled).[14]

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[14] *See also, e.g.*, *Ayers-Schaffner* v. *DiStefano*, 37 F.3d 726, 727, 729 (1st Cir. 1994) (where local government sought to limit the universe of people eligible to vote in curative election to the people who had voted in the initial election, held that such a course was "transparently unconstitutional" and that "depriving a qualified voter of the right to cast a ballot because of failure to vote in an earlier election is almost inconceivable"); *Bauer* v. *Souto*, 896 A.2d 90, 97 n.14 (Conn. 2006) ("There is nothing in our law or in

Indeed, Congress, too, thought there was a right not to vote when it drafted the National Voter Registration Act—which is why the provision on which respondents brought suit exists in the first place. *See, e.g.*, S. Rep. No. 103-6, at 17 (1993) ("The Committee recognizes that while voting is a right, people have an equal right not to vote, for whatever reason."); *see also* 139 Cong. Rec. 9204, 9225 (May 5, 1993) (Rep. Hoyer) (voters under the NVRA are "guaranteed the right not to vote"); 139 Cong. Rec. 4789, 4852 (Mar. 11, 1993) (Sen. Ford) ("Let it be the choice of individual citizens not to vote if that is their choice, but be registered and vote if they want to."); 139 Cong. Rec. 2427, 2461 (Feb. 4, 1993) (Rep. Fazio) ("Every citizen has the right to choose not to vote."); S. Rep. No. 103-6, at 17 ("No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue." (quoting Rev. Jesse Jackson)).

The choice of whether or not to vote sends a message about how a citizen views both the electoral process and the choices presented through that process in a given cycle. The Constitution protects citizens' right to make that choice freely, without fear of penalty. Although the government enjoys some leeway to regulate the electoral process, "[r]easonable regulation of elections *does not* require voters to espouse positions that they do not support." *Burdick*, 504 U.S. at 438. Coercing citizens to vote does just that. Ohio's "use-it-or-lose it" rule, like other types of forced political activity, offends the First Amendment.

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our democratic traditions to suggest that, if a voter does not vote in an election, he or she waives his right to do so when the results of that election prove unreliable and a court orders a new election.").

C. Ohio's Rule Places Real And Weighty Burdens On Principled Non-Voting

Ohio's policy imposes a number of burdens on principled non-voters who are removed from the rolls for exercising their right not to vote. Most obviously, these voters are forced to bear the cost and inconvenience of re-registering as a price for expressing their political views. But the policy burdens these voters in a number of other ways as well, all of which will be felt by a voter even if he or she is able to re-register in time to cast a ballot in the next election. Under the flexible balancing analysis employed by this Court in analyzing state election laws, these significant burdens on Ohioans' political rights must be carefully weighed against the interests the State offers to justify those burdens. *E.g.*, *Burdick*, 504 U.S. at 434; *Crawford* v. *Marion Cnty. Elec. Bd.*, 553 U.S. 181, 190-191 (2008) (Stevens, J., announcing the judgment of the Court) (the "balancing approach ... weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule"). Applying that balancing test here only heightens the constitutional concerns with Ohio's "use-it-or-lose-it" rule.

First, and perhaps most importantly, Ohio's rule strips citizens of their ability to sign petitions that get independent and smaller-party candidates (and initiatives, recalls, and virtually any other item to be voted on) onto the ballot. That right belongs *only* to registered voters. *See* Ohio Rev. Code § 3501.38(A). For Libertarian Party members and supporters, who all too often find no Libertarian Party candidates on the ballot, that loss of a basic political right under state law is particularly harmful. Indeed, the irony is that many supporters of the Libertarian Party and other "third

parties" would be more likely to forgo principled non-voting if there were more choices on the ballot, and getting more choices on the ballot in turn requires supporters of parties outside of the Republican and Democratic duopoly to remain on the voter rolls in order to sign ballot access petitions. Ohio's rule thus drives more voters to avoid the polls *even as it punishes them for it.*

Second, voters who are not registered will not appear on the voter file. *See* Ohio Rev. Code § 3503.15(G). But the public voter file, which includes information like party affiliation, is the primary means by which candidate campaigns and parties, including the Libertarians, reach voters in order to engage and persuade them.[15]

Again, this burden is particularly harmful on smaller parties and their supporters, whose ability to successfully associate and organize depends on the type of information-sharing and signaling that is accomplished by the voter registration database. That is in addition to the broader loss of opportunities to discuss the issues of the day and engage in the real-life back-and-forth of politics; the cost of not being on the rolls includes, for example, the likelihood that a local candidate for town council will walk past a citizen's house rather than knocking on the door and beginning a conversation. Principled non-voters are sending a message of discontent to their political leaders, and Ohio's response is to

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[15] *See, e.g.*, Cummings, *Q&A with Eitan Hersh: how campaigns use data to target voters*, Yale News (Aug. 13, 2015) ("There are three big sources of government records that campaigns rely on. First and foremost are voter registration records."), https://news.yale.edu/2015/08/13/qa-eitan-hersh-how-campaigns-use-data-target-voters.

render them invisible to those very leaders on the campaign trail.[16]

Third, Ohio's rule means that principled non-voting can lead to a voter being excised from measurements of public opinion altogether. Voter registration is a common screen for public polling.[17] The political disempowerment that comes from systematic exclusion from polling results can be quite direct. For example, during the 2016 campaign, polling results determined whether a presidential candidate was able to participate in televised debates.[18] Libertarian candidate Gary Johnson polled in double digits, and ultimately received almost 5 million votes nationwide, and over 150,000 votes in Ohio, but was not permitted to participate in the televised presidential debates. In this way, too, rules like Ohio's, which make it even harder for Libertarians and

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[16] Even voters who have been deemed "inactive" because they did not vote in a single election but who have not yet been purged from Ohio's voter rolls will be identifiable as such in the public voter registration records. *See* Ohio Rev. Code § 3503.26(B) (providing that voter registration records must include "the names and addresses of all registered electors sent confirmation notices and whether or not the elector responded to the confirmation notice"). That alone makes it less likely that candidates and political parties will engage with these voters, obstructing the voters' ability to incorporate their views into the relevant political discourse well before—and regardless of whether—they are ultimately purged from the voter rolls.

[17] *See, e.g.*, Gallup News, *What is the difference between registered voters and likely voters?* ("Registered voters are ... the group whose data Gallup reports most often[.]"), http://news.gallup.com/poll/110287/what-difference-between-registered-voters-likely-voters.aspx.

[18] *E.g.*, Hellman, *Poll: Majority of voters want Johnson on debate stage*, The Hill (Aug. 25, 2016), http://thehill.com/blogs/ballot-box/presidential-races/293324-poll-majority-of-voters-want-johnson-on-debate-stage.

others to have their voices break through, only reinforce the criticisms that lead citizens to engage in principled non-voting.

The significant burdens Ohio's policy places on principled non-voting far outweigh the justifications the State has put forth for the rule. While Ohio surely has an interest in maintaining accurate voter rolls, *e.g.*, *Crawford*, 553 U.S. at 194-197 (Stevens, J., announcing the judgment of the Court), a policy that systematically over-includes principled non-voters, marking them for potential de-registration because of their expression of disfavored political beliefs, is not justified. Ohio's interest in clean voter rolls does not "make it necessary," *Burdick*, 504 U.S. at 434, to impose these myriad burdens on principled non-voters' political rights, especially when the interest in accurate voter rolls could be achieved more effectively through other means. *E.g.*, C.A. Appellant Br. 8-9 & n.2. The "use-it-or-lose-it" rule contravenes First Amendment principles and cannot stand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICI CURIAE BRIEF FOR THE LIBERTARIAN PARTY OF OHIO AND THE CENTER FOR COMPETITIVE DEMOCRACY IN SUPPORT OF RESPONDENTS

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JON HUSTED, OHIO SECRETARY OF STATE, VOTER TURNOUT: NOV. 2, 2010 (https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/voter-turnout-november-2-2010/) 8

JON HUSTED, 2014 ELECTION RESULTS: OFFICIAL STATEWIDE RESULTS (https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results/) 8

Tom Jensen, Memo, Public Policy Polling, "Ohio's Governor's Race Continues to Looks (sic) Like a Toss Up," Dec. 16, 2013 (https://www.dropbox.com/s/ewme4r9vkeo25hf/12.16%20Gov%20LGBT%20Poll%20Result.pdf) 9

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INTEREST OF *AMICI CURIAE*[1]

1. The Libertarian Party of Ohio (LPO) is a political membership organization in Ohio that has enjoyed status as a political party under Ohio law intermittently since 1972. LPO was a fully recognized political party from 2008 through the 2014 general election, when it was stripped of its status as a recognized political party. During the span of this four-election period, which included two presidential elections, LPO clearly emerged as the third most popular political party in Ohio. Over the course of its existence, LPO repeatedly (and unconstitutionally) has been denied ballot access by Ohio officials. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 387-88 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 651 (2017). LPO continues to be a local affiliate of the national Libertarian Party and continues its fight to be restored to Ohio's electoral ballot. *See Libertarian Party of Ohio v. Ohio Secretary of State*, No. 16APE-07-496 (Ohio App. 2017) (pending).

2. The Center for Competitive Democracy ("the Center") was founded in Washington, D.C. in 2005 to strengthen American democracy by increasing electoral competition. The Center works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering

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[1] Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondents and Petitioner have both filed global consents to *Amici* filings.

active civic engagement in the political process. The Center has participated in numerous cases involving electoral barriers across the country as either *Amicus Curiae* or through direct representation. *See, e.g., Constitution Party of Pa. v. Cortes*, 116 F.Supp.3d 486 (E.D. Pa. 2015) (holding Pennsylvania's statutory scheme for minor parties and independent candidates unconstitutional), *aff'd*, 824 F.3d 386 (3d Cir. 2016).

STATEMENT OF FACTS

Ohio, like most states, purges voter registrations that are incorrect or out-of-date. Ohio's principal method for doing so is its statutory "NCOA Process," which compares registered voters' names and addresses with the names and addresses of those who have filed changes with the post office. An apparent change "triggers" a confirmation letter from Ohio's Secretary of State, which if not responded to and followed by voter inactivity results in removal from Ohio's voter registration rolls.

Ohio's Secretary of State has supplemented the NCOA Process with an additional trigger; those who choose not to vote are also selected for confirmation letters. Should they then not respond to the confirmation letter and not vote in one of the next two general elections they are (like those who had changed addresses) removed from Ohio's voter registration rolls.

The Sixth Circuit below correctly ruled that the Secretary's supplemental process, which uses voter

inactivity as its trigger, violates the National Voter Registration Act (NVRA) and Help America Vote Act (HAVA). *A. Philip Randolph Institute v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016). This Court granted certiorari to consider whether federal law "permit[s] Ohio's list maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?"

SUMMARY OF ARGUMENT

Like many states, Ohio has engineered its laws and practices to protect its two-party system. Ballot access laws make it extremely costly and difficult for minor political parties and minor candidates to win space on Ohio's ballots. Because of Ohio's restrictive access laws and mechanisms, even minor parties in Ohio that are capable of achieving ballot access are often stripped of their status. They must begin the whole process anew. This is precisely what has happened to the LPO.

When minor parties and their candidates are removed from ballots, their supporters do not simply turn their allegiance to the major parties. Instead, they frequently stay home. They choose not to vote. Data both nationally and in Ohio support this fact. Ballots without minor candidates experience lower voter turnouts, especially when the excluded political parties and candidates are the third most popular in the state (as is true of the LPO). This is because supporters of those

alternative political parties do not vote. Consequently, Ohio's use of non-voting to trigger removal of voters from its ballots not only infringes the constitutional right not to vote, it effectively discriminates against disaffected voters, including those who support alternative political parties.

ARGUMENT

Ohio's two major parties have routinely prevented minor parties and minor candidates from gaining ballot access. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 387-88 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 651 (2017) ("As our Circuit explained in a related opinion, 'the LPO has struggled to become and remain a ballot-qualified party in Ohio through frequent litigation.' Throughout this struggle, '[t]he LPO has successfully challenged Ohio laws burdening its access to the ballot,' including a significant victory in 2006.") (quoting *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 405 (6th Cir. 2014) and citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)). Most recently in Ohio, the Republican Party spent several hundred thousand dollars to remove the LPO's gubernatorial candidate, Charlie Earl, from the 2014 ballot. *See Earl v. Ohio Elections Commission*, 2016 WL 5637037 *3 (Ohio Ct. App. 2016). Ohio's and its Republican Party's most recent action, moreover, insured that LPO candidates would not appear on future Ohio ballots. *See Libertarian Party of Ohio v. Husted*, 751 F.3d at 410. Gary Johnson, for example, was forced to

run as an independent candidate in Ohio for President in 2016 and still won 3% of the total vote. Had LPO not been removed from the ballot by Petitioner following the 2014 election, Johnson's success would have maintained LPO's status as a qualified political party for four more years. *See State ex rel. Fockler v. Husted*, ___ N.E.3d ___, 2017 WL 371469 (Ohio 2017).

The two major parties have succeeded in suppressing the emergence of minor parties in two important ways in Ohio and across the United States. First, through their control of legislative and executive processes, they have passed restrictive access laws that make it virtually impossible for minor parties to survive and thrive on America's ballots. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 598 ("Ohio is among the most restrictive, if not the most restrictive, state in granting minor parties access to the ballot."). Next, even when minor parties and candidates meet local requirements, they are frequently sabotaged by the major parties' selective enforcement of trivial rules. *See, e.g., Libertarian Party of Ohio v. Husted*, 751 F.3d at 406 (describing several petition requirements in Ohio). The two major parties' enormous financial advantages and official resources make this latter technique especially effective. *See* Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 CAP. U. L. REV. 163, 232 (2006) (Democrats succeeded in removing Nader "because their resources allowed them, without check or balance, to dissect every technical requirement of Ohio law.").

The Libertarian Party of Ohio fell victim to both techniques. The Republican Party spent several hundred thousand dollars to remove LPO's candidates from the ballot, and Ohio's (Republican) legislature passed a new law that made it virtually impossible for the Libertarian Party to re-qualify in time for the 2016 presidential election.

Manipulating ballots is not limited to the Republican Party, nor is it confined to Ohio. Democrats do it, too, in lots of states. The Democratic Party, for example, succeeded in removing Ralph Nader from Ohio's presidential ballot in 2004, as well as the presidential ballots in several other states. *See* THERESA AMATO, GRAND ILLUSION: THE MYTH OF VOTER CHOICE IN A TWO-PARTY TYRANNY (2009) (describing the obstacles Democrats threw at Nader in 2004); Brown, *supra*, at 166 ("Democrats engaged in a coordinated campaign to remove Nader's name from state ballots through what can best be described as 'kitchen sink' legal arguments."). They did so in Ohio by invoking Ohio's prohibition on using non-resident circulators, a law that was only invalidated four years later (too late to save Nader's 2004 candidacy). But for the Democrats' challenge under this unconstitutional Ohio law, Nader would have appeared on Ohio's 2004 presidential ballot. *See Nader v. Blackwell*, 545 F.3d 459, 472 (6th Cir. 2008) ("but for Blackwell's decision to apply [Ohio's prohibition on non-resident circulators] and invalidate 1701 of Nader's signatures, Nader would have remained on the ballot.").

Whether practiced by Democrats or Republicans, the common objective pursued by the major parties is to gain an advantage in the voting booth. There is little downside to doing so, and much to gain, making it a frequent practice. For instance, Republicans in Ohio in 2014 believed that Libertarians, without a gubernatorial candidate, would vote for John Kasich. *See* Henry J. Gomez, *Could a conservative third-party challenger cause trouble for Ohio Gov. John Kasich in 2004? Analysis*, CLEVELAND.COM, Sep. 13, 2013 (http://www.cleveland.com/open/index.ssf/2013/09/could_a_conservative_third-par.html#incart_river) ("An election where Tea Party voters stay home or – just as bad for Kasich – show up and cast ballots for a third-party candidate with no chance of winning, could propel [Democrat] FitzGerald to the governor's chair.") (last visited Aug. 17, 2017). Democrats in 2004 felt Nader's supporters would support John Kerry. *See* Brown, *supra*, at 217 ("Democrats feared that Nader would siphon support from John Kerry's campaign.").

Do minor party/minor candidate supporters switch to supporting major party candidates? Do they still turn out to vote after their parties and candidates are wiped from the ballot? Some do. But many do not. Instead, when stripped of their candidates, minor party supporters often simply refrain from voting.

Ballot access expert Richard Winger, after exhaustively analyzing and comparing data from across the United States, has concluded that purging minor candidates from ballots reduces voter turnout. Richard Winger, *Is There a Connection Between California's*

Recent Low Voter Turnout and the Top-Two System?, FOX&HOUNDS, Feb. 26, 2015 (http://www.foxandhoundsdaily.com/2015/02/is-there-a-connection-between-californias-recent-low-voter-turnout-and-the-top-two-system/) (last visited Aug. 10, 2017). In particular, "California's turnout went from 45.8% in November 2010, to 30.8% in November 2014" following its adoption of a top-two system that effectively banned minor candidates. *Id.* California, Winger observed, was the only state in 2014 which absolutely prohibited voters from casting votes for any state-wide candidates other than those supported by the two major parties. California, in turn, was "the only state in which the turnout in 2014, as a percentage of the 2010 turnout, was below 70%." *Id.*

A review of Ohio's official election data reveals that Ohio experienced a similar experience by removing the LPO from its top-of-the-ticket ballot during this same time-frame. In 2010, when the LPO ran a gubernatorial candidate (who won 2.39% of the popular vote, the third largest total), 3,956,045 total votes were cast. That translated to 49.22% of registered voters. *See* JON HUSTED, OHIO SECRETARY OF STATE, VOTER TURNOUT: NOV. 2, 2010 (https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/voter-turnout-november-2-2010/) (last visited Aug. 10, 2017). In 2014, without Ohio's third-most-popular party (LPO) being allowed to run its top-of-the-ticket candidate for governor, only 3,149,876 votes were cast (40.65% of registered voters). JON HUSTED, 2014 ELECTION RESULTS: OFFICIAL STATEWIDE RESULTS

(https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results/) (last visited Aug. 10, 2017). Consequently, without an LPO candidate for governor in 2014, voter turnout in Ohio dropped dramatically from that found in the previous gubernatorial election conducted in 2010 (when LPO last ran a gubernatorial candidate).

Data collected by Professor Michael McDonald for the United States Election Project (which was relied upon by Winger) confirms this significant drop. Using the number of people who were eligible to vote, as opposed to those who actually registered, Professor McDonald's data indicates that Ohio's vote total for 2010 dropped from 46.2% of eligible voters, *see* UNITED STATES ELECTION PROJECT: 2010 NOVEMBER GENERAL ELECTION TURNOUT RATES (http://www.electproject.org/2010g) (last visited Aug. 10, 2017) to 36.2% in 2014. *See* UNITED STATES ELECTION PROJECT: 2014 NOVEMBER GENERAL ELECTION TURNOUT RATES (http://www.electproject.org/2014g) (last visited Aug. 10, 2017).

Polling before the Libertarian gubernatorial candidate in 2014 (Earl) was removed from the ballot, meanwhile, indicated that Earl was supported by 6% of registered voters in Ohio. *See* Tom Jensen, Memo, Public Policy Polling, "Ohio's Governor's Race Continues to Looks (sic) Like a Toss Up," Dec. 16, 2013 (https://www.dropbox.com/s/ewme4r9vkeo25hf/12.16%20Gov%20LGBT%20Poll%20Result.pdf) (last visited Aug. 10, 2017). The percentage of undecided voters, meanwhile, stood at 16%. *Id.* Overall turnout without a Libertarian candidate for governor on Ohio's ballot

in 2014 dropped approximately 10% from 2010 levels. This suggests that while some of the disaffected eligible voters may have still turned out to vote, more did not.

These drops in voter turnout in California and Ohio reinforce what minor parties have always known; their supporters do not simply turn out and vote for major-party candidates. Instead, supporters of minor parties and minor candidates, when their preferences are excluded or removed from ballots, often stay home. They choose not to vote.

A corollary of the fundamental right to vote is the fundamental right not to vote. Affirmative First Amendment freedoms necessarily carry correlative negative rights. The right to speak includes the right not to speak. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Similarly, the right to associate implies the right not to associate. *See California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("a corollary of the right to associate is the right not to associate"). The right to vote must include a constitutional right not to vote. And the exercise of such a right plainly cannot be punished. *See Harman v. Forssenius*, 380 U.S. 528, 541 (1965) ("It has long been established that State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.").

Supporters of minor parties and candidates exercise their constitutional right not to vote at a greater rate than those who align themselves with America's political mainstream. This is caused, in part, by the two major parties, which routinely block alternative parties and candidates from participating in America's electoral process. Regardless of why this happens, *Amici Curiae* believe that Ohio's triggering mechanism – singling out those who do not vote – is not politically random nor neutral. Its disproportionate impact falls most heavily on disaffected voters, who disproportionately support minor political parties and candidates. Ohio's approach adds to the many barriers it has placed in the path of alternative parties that seek to change America's troubled political landscape.

CONCLUSION

The Sixth Circuit's decision should be AFFIRMED.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Bush v. Vera,
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Chisom v. Roemer,
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Easley v. Cromartie,
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Evenwel v. Abbott,
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Georgia v. Ashcroft,
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Gomillion v. Lightfoot,
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Good Samaritan Hosp. v. Shalala,
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League of United Latin Am. Citizens v. Clements,
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League of United Latin Am. Citizens v. Perry,
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Morse v. Republican Party of Va.,
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Nw. Austin Mun. Util. Dist. No. One v. Holder,
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Obergefell v. Hodges,
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Scott v. Schedler,
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Shaw v. Hunt,
517 U.S. 899 (1996).....1

Shelby Cty. v. Holder,
133 S. Ct. 2612 (2013).....1

Smith v. Allwright,
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Terry v. Adams,
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Thornburg v. Gingles,
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U.S. Student Ass'n Found. v. Land,
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United States v. Hays,
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United States v. Smith,
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Veasey v. Abbott,
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Watt v. Alaska,
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Welker v. Clarke,
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White v. Regester,
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Yick Wo v. Hopkins,
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Zimmer v. McKeithen,
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Federal Statutes

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52 U.S.C. § 20501(b)(2) 14

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Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (52 U.S.C. 20901 (Supp. III 2015)) ..... *passim*

National Voter Registration Act of 1993, Pub. Law No. 103-31, 107 Stat. 77 (52 U.S.C. 20501 (Supp. III 2015)) ..... *passim*

Regulations

Establishment of the Civil Rights Division in the Department of Justice, 22 Fed. Reg. 10,310-02 (Dec. 9, 1957) 7

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Other Authorities

Amended Joint Stipulation, *United States v. Cibola Cty.*, No. 93-1134 (D.N.M. Jan. 31, 2007) 9

Becker, David, *Just the Facts on Fraud*, Center for Election Innovation and Research, May 1, 2017, https://www.electioninnovation.org/news/2017/5/1/just-the-facts-on-fraud 17

Blackman, Josh, *Presidential Maladministration*, U. Ill. L. Rev. 2018, https://ssrn.com/abstract =2888172 .....8, 16, 22

Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), ECF No. 417 22

Brief for the United States as Amicus Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (U.S. Aug. 7, 2017), 2017 WL 3485554 .....5, 6, 15, 18,22

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Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants and Urging Reversal, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016) (No. 16-3746) 4, 6, 10, 11, 15, 18

Cavanaugh, M. L., *I Fight for Your Right to Vote. But I Won't Do It Myself*, N.Y. Times, Oct. 19, 2016 13

Complaint, *Ind. State Conf. of NAACP v. Lawson*, No. 1:17-cv-02897 (S.D. Ind. Aug. 23, 2017) 26

Complaint, *NAACP Legal Defense & Educational Fund, Inc. v. Trump*, No. 1:17-cv-5427, 2017 WL 3046985 (S.D.N.Y. July 18, 2017) 17

Consent Decree, *United States v. Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 3, 2017) 24

Corrected Brief for Appelles, *Chamber of Commerce of U.S. v. Dep't of Labor*, No. 17-10238 (5th Cir. July 3, 2017) 23

Ennis, Bruce J., *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603 (1984) 20

Exhibit 1 of Motion for Continuance of Public Fairness Hearing, *United States v. Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 3, 2017) 23

Gressman, Eugene, *Supreme Court Practice* (9th ed. 2007) 20

H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993) 4, 12

H.R. Rep. No. 107-329, 107th Cong., 1st Sess. (2001) 4

Letter from Deval Patrick, Asst. Att'y Gen. (USDOJ), to Dennis R. Dunn, Sr. Asst. Att'y Gen. (Ga.) (Oct. 24, 1994) 9

Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Bruce Botelho, Att'y Gen. (Alaska) (Feb. 11, 1997).....9

Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Mark Barnett, Att'y Gen. (S.D.) (Feb. 11, 1997).....9

Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep't of Justice to the Honorable Kim Westbrook Strach, Executive Director, State Board of Elections, North Carolina (June 28, 2017), https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html.....25

Levitt, Justin, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Wash. Post, Aug. 6, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/08/06/ a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast.....17

Levy, Pema, *These Three Lawyers Are Quietly Purging Voter Rolls Across the Country*, Mother Jones, July 7, 2014 26

Memorandum from Jefferson B. Sessions, III, Attorney General, Washington, D.C. on Supporting Federal, State, Local, and Tribal Law Enforcement (Mar. 31, 2017) 23

Memorandum from Jefferson B. Session, III, Attorney General, Washington, D.C. on Rescission of Memorandum on the Use of Private Prisons (Feb. 21, 2017), https://www.bop.gov/resources/news/pdfs / 20170224_doj_memo.pdf 23

Motion for Further Relief, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Oct. 23, 1997) 9, 12

Myth of Voter Fraud, Brennan Center for Justice, https://www.brennancenter.org/issues/voter-fraud 17

Order, *United States v. Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 3, 2017) 24

Order Granting in part and Denying in part Plaintiffs Voting Rights Coalition and United States' Motion for Further Relief, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Nov. 2, 1995).....12

Reply Brief for Appellants, *Nevada v. U.S. Dep't of Labor*, No. 16-41606 (5th Cir. June 30, 2017) 23

S. Rep. No. 6, 103d Cong., 1st Sess. (1993) 4, 12

Statement of Interest of the United States, *Common Cause v. Kemp*, No. 1:16-cv-452-TCB, 2017 WL 2628543 (N.D. Ga. Mar. 17, 2017) 9, 11, 15

Stern, Mark Joseph, *Kobach Email Confirms Trump Administration's Goal to Gut Vital Voting Rights Law*, Slate, July 18, 2017 18

U.S. Dep't of Justice, Civil Rights Division, *Summary of Selected Federal Protections for Eligible Voters* (updated Sept. 5, 2016), https://www.justice.gov/crt/summary-selected-federal-protections-eligible-voters 7

U.S. Dep't of Justice, The National Voter Registration Act of 1993 (NVRA): Questions and Answer (updated Sept. 1, 2016), https://web.archive.org/web/20170704094837/https:/www.justice.gov/crt/national-voter-registration-act-1993-nvra. 11

U.S. Department of Justice, Voting Rights Policy and Guidance, https://www.justice.gov/crt/voting-rights-policy-and-guidance 20

United States Motion for Summary Judgment, *United States v. Pennsylvania*, Nos. CIV. A. 95-382, CIV. A. 94-7671, 1996 WL 729813 (E.D. Pa. Dec. 19, 1996) 9, 14

United States Motion for Voluntary Dismissal, *Veasey v. Abbott*, No. 2:13-cv-193, 2017. U.S. Dist. LEXIS 54253 (S.D. Tex. Apr. 10, 2017) 24

Unopposed Motion for Voluntary Dismissal, *Texas v. United States*, No. 16-11534 (5th Cir. Mar. 2, 2017) 22

Wines, Michael & Rachel Shorey, *Inside the Uproar Over a Government-Led Search for Voter Fraud*, N.Y. Times, July 8, 2017 25

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan law organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color.

Because equality of political representation is foundational to our democracy, and the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for nearly a century to combat threats to equal political participation. Indeed, LDF has been involved in numerous precedent-setting cases relating to minority political representation and voting rights before federal and state courts. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S.

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[1] Pursuant to Supreme Court Rule 37.3, counsel for amici curiae certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Hous. Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014); *Kirksey v. Bd. of Supervisors of Hinds Cty.*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, and by helping to secure passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, it has participated as amicus in cases of great public importance that affect the interests of many individuals other than the parties before the Court and, in particular, the interests of constituencies in The Leadership Conference's coalition.

Consequently, amici have a significant interest in ensuring the full, proper, and continued enforcement of federal statutes guaranteeing full political participation, including the National Voter Registration Act of 1993 ("NVRA"), Pub. Law No. 103-31, 107 Stat. 77 (52 U.S.C. 20501 *et seq.* (Supp. III 2015)), and the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (52 U.S.C. 20901 *et seq.* (Supp. III 2015)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to vote is foundational to our system of government and essential to all other rights of citizenship. It is so foundational that it cannot be forfeited simply by a failure to exercise it. Indeed, citizens can choose not to vote without losing their right to vote again later. While this Court regularly examines questions about the affirmative exercise of the vote, this case involves the equally important issue of when a citizen does not or cannot vote for a certain period and whether such inactivity can justify purges of the voter rolls. In practice, non-voting can happen for any number of reasons, including, but not limited to: military service; workplace or family obligations on Election Day; the costs of obtaining voter identification; relocation; lack of confidence that existing voting systems provide an equal opportunity to participate in the political process and to elect candidates of one's choice; or dissatisfaction with the options on the ballot. Indeed, senior national security and intelligence officials regularly choose not to vote as an expression of non-partisanship.

Consistent with these principles, and with the plain text of the statutes, the United States Department of Justice ("Department" or "DOJ") has long recognized that HAVA and the NVRA prohibit laws that purge voter rolls based on the fact that a person has not voted. And, just fourteen months ago, in this very case, the Department of Justice represented to the Sixth Circuit that:

> Congress designed the NVRA to "ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction," recognizing that "while voting is a right, people have an equal right not to vote, for whatever reason."

Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants and Urging Reversal at 28, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016) (No. 16-3746) (hereinafter "U.S. Sixth Circuit Amicus Brief") (quoting S. Rep. No. 6, 103d Cong., 1st Sess., at 17 (1993) and H.R. Rep. No. 9, 103d Cong., 1st Sess., at 18 (1993)). Congress passed HAVA to further "improve our country's election system" by "assisting state and local government in modernizing their election systems." H.R. Rep. No. 107-329, 107th Cong., 1st Sess., at 32 (2001). The Department of Justice recognized that HAVA "does not alter the NVRA's basic requirements," and, more specifically, "HAVA provides that if an individual is to be removed from a State's voter registration list, the voter 'shall be removed in accordance with' the NVRA." U.S. Sixth Circuit Amicus Brief at 14 (quoting 52 U.S.C. 21083(a)(2)(A)(i)) and n.4 (noting one exception "not applicable here").

Accordingly, the Department explained that Ohio's Supplemental Process for inquiring into a voter's change in address, which is triggered by the person's voting inactivity, violates the NVRA and HAVA. Triggering the address confirmation process based "solely on voter inactivity," the Department stressed, "inevitably results in the removal of voters based on nonvoting, which violates the NVRA and HAVA." *Id.* at 8. This conclusion was compelled by the NVRA's "text, structure, purpose, and history." *Id. Infra* § I.A.

One year later, in a startling volte-face, the Department of Justice now argues in the same case that "the NVRA does not," in fact, "prohibit a State from using nonvoting" as the trigger for its voter removal process. Brief for the United States as Amicus Curiae Supporting Petitioner at 14, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (U.S. Aug. 7, 2017), 2017 WL 3485554, at *14 (hereinafter "U.S. Supreme Court Amicus Brief"). It now contends that this position, not the opposite one it espoused for more than two decades, including in this very case until August 7, 2017, is "supported by the NVRA's text, context, and history." *Id. Infra* § I.B.

The Court should give no weight to the Department's revisionist construction of the NVRA and HAVA. The Department offers no meaningful explanation for why it now reads the same words of those Acts to mean the converse of what it has said for more than twenty years. To be sure, there is nothing inherently improper about the Department changing its position on a given issue. It might appropriately do so when the law has changed or when, in the course of administering or enforcing the law, the Department

finds that its prior position is no longer feasible or justifiable. Or, in some cases, the Department may find it prudent to adapt to evolving societal understandings or respond to new scientific developments.

But here, the law has not changed. And the Department of Justice has not cited any findings or other data to justify the 180-degree reversal of its longstanding interpretation of the NVRA and HAVA, which it memorialized years ago in guidelines given to States, local governments, and the public to aid their understanding of the Acts' requirements. *See* U.S. Sixth Circuit Amicus Brief at 15-16 (describing the Department's 2010 guidelines).

Nor has the Department advanced any reasoned analysis, based on its enforcement of these laws, that would justify its change in position. The Department professes an abstract concern about "voter fraud," but that only highlights that there is no principled basis for the Department's change of position in this case. *See* U.S. Supreme Court Amicus Brief at 3, 32. The Department offers no evidence to suggest that voter inactivity is evidence of a change in residence, much less an indication of improper voting. And voter fraud is, by all reputable accounts, virtually nonexistent in this country. Nonetheless, it has unfortunately become a fashionable mantra in certain quarters, often invoked as a pretext to limit or contort voter protection laws, like the NVRA and HAVA. *Infra* § I.C.

Ultimately, this case is about more than Ohio's particular electoral processes, and it will have broad implications. It arises amidst a nationwide push to make it more difficult and costly to vote—including by regularly removing registered voters from the active

voter rolls. If Ohio's position, newly endorsed by this Administration, is embraced by this Court, it is likely to unleash a wave of new state and local laws that are aimed at or will result in unnecessarily purging and shrinking the voting rolls. The Court should foreclose the manipulation of such a critical aspect of voter registration and affirm the decision of the Sixth Circuit.

ARGUMENT

I. The Court Should Embrace The Department Of Justice's Longstanding Prior Position That Voter Inactivity Cannot Permissibly Trigger The Removal Of A Voter Under The NVRA And HAVA.

The United States has an enduring and substantial interest in protecting citizens' right to vote. Since the 1957 establishment of the Civil Rights Division of the Department of Justice, in particular, ensuring "full and fair access to the political process for all eligible Americans"[2] has been a paramount federal duty. Congress therefore gave the Attorney General broad authority to enforce the NVRA and HAVA on behalf of the United States. 52 U.S.C. §§ 20510, 21111.

For more than two decades, spanning the terms of Republican and Democratic presidents alike, the Department of Justice has consistently asserted to

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[2] U.S. Dep't of Justice, Civil Rights Division, *Summary of Selected Federal Protections for Eligible Voters* (updated Sept. 5, 2016), https://www.justice.gov/crt/summary-selected-federal-protections-eligible-voters; *see also* Establishment of the Civil Rights Division in the Department of Justice, 22 Fed. Reg. 10,310-02 (Dec. 9, 1957) (establishing and charging the Civil Rights Division with enforcing "all Federal statutes affecting civil rights").

States, courts, and the public that the NVRA and HAVA prohibit laws like Ohio's Supplemental Process that trigger the ultimate removal of a person from a voter registration list based solely on the person's voting inactivity. *Infra* n.3. This is the position that the Department took in its amicus brief below, and it is the position that the Court should adopt here.

The Department, however, now asks this Court to reach exactly the opposite conclusion, offering no explanation for its "legal U-turn" other than that the new Administration reconsidered the issue. This is by no means the only flip-flop that the Department has taken with respect to civil rights enforcement in the past eight months. *See, e.g.*, Josh Blackman, *Presidential Maladministration*, U. Ill. L. Rev. 2018 (forthcoming), *available at* https://ssrn.com/abstract=2888172 (describing the Administration's changes in position on numerous legal issues); *see also infra* 22-23. Where, as here, the Department's about-face is prompted solely by a change in Administration and is unaccompanied by any other change in circumstance, its "reconsideration" of an issue implies no more than a naked political decision. This Court should accord no weight to the Department's interpretation *du jour* and should remain mindful of the Department's long-held previous construction of the NVRA and HAVA.

A. The Department's Original Position In This Case Has Prevailed For More Than Two Decades And Comports With The Letter And Spirit Of The NVRA And HAVA.

For more than two decades, spanning administrations of both major political parties, the Department

of Justice explicitly rejected and consistently opposed the interpretation of the NVRA and HAVA that it now advances.[3] For example, in a case involving Georgia's proposed voter purge procedures, the Department previously explained that "[b]oth the NVRA and HAVA clearly state that once registered, an eligible voter's decision not to vote (*e.g.*, based on dissatisfaction with the candidates on offer in particular elections) cannot suffice to place his or her constitutional right to vote in jeopardy." Statement of Interest of the United States at 13, *Common Cause v. Kemp*, No. 1:16-cv-452-TCB, 2017 WL 2628543 (N.D. Ga. Mar. 17, 2017) (hereinafter "*Kemp* Statement of Interest");

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[3] *See, e.g.*, Letter from Deval Patrick, Asst. Att'y Gen. (USDOJ), to Dennis R. Dunn, Sr. Asst. Att'y Gen. (Ga.) (Oct. 24, 1994) (objecting to Georgia's proposed voter purge procedure because the "'no contact' rule for triggering the mailing of a registration confirmation notice" is "directly contrary to the language and purpose of the NVRA, and [] likely to have a disproportionate adverse effect on minority voters in the state"); Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Mark Barnett, Att'y Gen. (S.D.) (Feb. 11, 1997) (notifying South Dakota of intent to sue because "registered voters who fail to vote within a four year period are specifically targeted for inclusion in the state's voter removal program" and "these procedures violate the NVRA"); Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen. (USDOJ), to Bruce Botelho, Att'y Gen. (Alaska) (Feb. 11, 1997) (same); United States Motion for Summary Judgment at 14-18, *United States v. Pennsylvania*, Nos. CIV. A. 95-382, CIV. A. 94-7671, 1996 WL 729813 (E.D. Pa. Dec. 19, 1996) (litigation against Pennsylvania); Motion for Further Relief at 5-9, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Oct. 23, 1997) (litigation against California); and Amended Joint Stipulation at ¶ 13, *United States v. Cibola Cty.*, No. 93-1134 (D.N.M. Jan. 31, 2007) (litigation against Cibola County, New Mexico for violation of the NVRA, including removal of registrations based on failure to vote).

id. (contrasting "declining to participate [in a given election]" with "independent, objective, and reliable evidence of a changed residence").

Likewise, the Department took the same position just one year ago in this very case. It explained that the "NVRA permits States to remove voters only for a reason enumerated [in the statute]: 'at the registrant's request, due to criminal conviction or mental incapacity as provided by state law, the death of the registrant, or due to a change of the registrant's residence.'" U.S. Sixth Circuit Amicus Brief at 16 (quoting *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 376 (6th Cir. 2008)).

To remove a person because of a change in address under Section 8(d) of the NVRA, a State must have evidence that the voter has moved. *See* U.S. Sixth Circuit Amicus Brief at 8. Furthermore, that evidence must be sufficiently reliable to trigger a process intended to "confirm" the change in address. *Id.* at 18. Examples of reliable evidence may be found in the statute itself (*e.g.*, the Postal Service's "change of address" program) and the Department's prior NVRA guidance document (describing an alternative "uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction" and then "us[ing] the information obtained from returned non-deliverable mail" to trigger the confirmation process). *Id.* at 19. Indeed, until the day it filed its amicus brief with this Court, the Department's official website displayed the Department's 2010 formal guidance on the NVRA "stress[ing]" the need for reliable second-hand information indicating a change in residence outside the jurisdiction. *See* United States Dep't of Justice, The

National Voter Registration Act of 1993 (NVRA): Questions and Answer (updated Sept. 1, 2016) (hereinafter "Department's 2010 formal guidance"), https://web.archive.org/web/20170704094837/https://www.justice.gov/crt/national-voter-registration-act-1993-nvra.[4]

"It is unreasonable to infer that a voter may have changed residences solely because she has not voted in the last two years." U.S. Sixth Circuit Amicus Brief at 9. That is because "[a] voter's decision not to vote or otherwise interact with the political process or election officials says nothing reliable about whether a voter has become ineligible by having moved away." *Kemp* Statement of Interest at 17.

Applying these principles—and the plain language of the statute—the Department has, until very recently, maintained that Ohio's Supplemental Process violates the NVRA and HAVA because it improperly "assumes that voters who have not cast a ballot in two years have moved," U.S. Sixth Circuit Amicus Brief at 10, and therefore is "grossly overinclusive" and "cannot constitute a 'reasonable effort' to remove individuals who actually have moved." *Id.* at 19-20; *cf. Dunn v. Blumstein*, 405 U.S. 330, 346, 351 (1972) (rejecting Tennessee voting procedure where "the record is totally devoid of any evidence that durational residence

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[4] *See also Kemp* Statement of Interest at 15 n.7 ("The Department of Justice guidance stresses that a general program under Section 8 to purge voters who may have moved away should be triggered by reliable second-hand information indicating a change of address outside of the jurisdiction, from a source such as the NCOA program, or a general mailing to all voters.") (citing the Department's 2010 formal guidance).

requirements are in fact necessary to identify bona fide residents," and finding the State's practice over-inclusive and "all too imprecise").

This conclusion, the Department showed, is supported by the text, purpose, and legislative history of both the NVRA and HAVA, and by case law. *See Welker v. Clarke*, 239 F.3d 596, 598-599 (3d Cir. 2001); Order Granting in part and Denying in part Plaintiffs Voting Rights Coalition and United States' Motion for Further Relief, *Wilson v. United States*, Nos. 95-20042, 94-20860 (N.D. Cal. Nov. 2, 1995). Indeed, Congress was keenly aware that purging the voter rolls had the effect, and in some cases the purpose, of reducing registration rates and, consequently, participation in federal elections. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (1993) (identifying "annual reregistration requirements" as among "the techniques developed to discourage participation" around the turn of the twentieth century); S. Rep. No. 103-6, at 3 (1993) (same).[5]

The Department's former interpretation is also entirely logical, since, as other amicus briefs in support

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[5] *See also* S. Rep. No. 103-6, at 2 (1993) (NVRA aims to "assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction."); *id.* at 18 ("[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again."); H.R. Rep. No. 103-9, at 15 (expressing concern that state list-maintenance programs "may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing").

of Respondents detail, people sometimes cannot or do not vote for a panoply of legitimate reasons, including: service in the armed forces, outright barriers or burdens to voting like costly voter IDs, lack of transportation, and work-place and family obligations on Election Day; voting methods or redistricting plans that contribute to voters' belief that they lack an equal opportunity to participate in the political process and to elect candidates of their choice; or lack of compelling or competitive candidates that motivate voters to participate. *See also* M. L. Cavanaugh, *I Fight for Your Right to Vote. But I Won't Do It Myself*, N.Y. Times, Oct. 19, 2016 ("George C. Marshall, Dwight D. Eisenhower and Patton . . . didn't vote while in uniform, and those of the modern era [] tread the same path — [including General] David H. Petraeus [and former Chairman of the Joint Chiefs of Staff] Martin Dempsey.").

B. The Department Offers No Meaningful Basis For Its Reversal In Position.

This Court has recognized that there may be situations when a change in an agency's position is appropriate. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (observing that the Secretary of Health and Human Services is "not estopped from changing a view"). For example, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," requiring new analysis—and with it potentially new interpretations—of the law. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). Or, where "an enhanced understanding of the issue" emerges based on "referenda, legislative debates, and grassroots campaigns"—or

"studies, papers, books, and other popular and scholarly writing"—an agency may reasonably adapt to these emerging views and understandings. *Id.*

Here, however, the Department has not offered any new insights or understandings that inform its change in position. Nowhere in its new brief is there a reference to any recently gained "institutional knowledge" or much of "anything indeed" to explain its new position. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012); *see also id.* (describing as "crass" the account that after the change in Administration, the Department reconsidered a legal question).

Instead, without any principled explanation, the Department has markedly shifted its focus in construing the NVRA and HAVA. For more than two decades, it analyzed this issue with the NVRA's first two stated goals in mind—to "increase the number of eligible citizens who register to vote," and to "enhance[] the participation of eligible citizens as voters," 52 U.S.C. § 20501(b)(1) & (2). *See, e.g.*, United States Motion for Summary Judgment at 39, *United States v. Pennsylvania*, Nos. CIV. A. 95-382, CIV. A. 94-7671, 1996 WL 729813 (E.D. Pa. Dec. 19, 1996) ("Pennsylvania has not assumed its responsibility 'to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for federal office.'") (citation omitted). Today, however, it ignores those objectives and looks myopically at whether Ohio's Supplemental Process purportedly advances the latter two goals of the NVRA—to "'protect the integrity of the electoral process' and ensure that States maintain 'accurate and current' voter rolls," 52 U.S.C.

§ 20501(b)(3) & (4). *See* U.S. Supreme Court Amicus Brief at 3.

The Department's new emphasis on electoral integrity and maintaining accurate voter rolls, however, overlooks the fact that practices like Ohio's Supplemental Process thwart those goals as well. By purging eligible voters, Ohio's Supplemental Process produces inaccurate registration rolls and undermines the integrity of the electoral process. *See* U.S. Sixth Circuit Amicus Brief at 20 ("Without reliable evidence upfront to suggest that a voter may have moved, the Section 8(d) process by itself is not a reasonable way to identify persons who have changed residence because it will inevitably lead to the removal of individuals who are eligible to vote and who have not in fact changed residence.").

Instead, the Department conjures up the specter of "voter fraud" as the basis for its new perspective on the NVRA and HAVA. U.S. Supreme Court Amicus Brief at 3. As a threshold matter, the Department's newly posited interest in the illusory phenomenon of voter fraud cannot justify departing from the plain text of the NVRA and HAVA. And, as the Department has persuasively shown in the 2010 guidance and its numerous prior briefs on this subject, the plain text of those statutes does not permit voter inactivity to trigger voter purges. *See, e.g., Kemp* Statement of Interest at 16 n.8 ("[T]he NVRA's plain text prohibits using non-voting to trigger the purging process . . . ."); U.S. Sixth Circuit Amicus Brief at 8, 16 & n.8, 29-30. The text of the Acts remains fixed, as it has not been amended or superseded, and it is not susceptible to the Department's newfound "fluid construction."

Blackman, *supra*, at 1 ("[W]here an incoming administration reverses a previous administration's interpretation of a statute, simply because a new sheriff is in town, courts should verify if the statute bears such a fluid construction.").[6]

Moreover, nowhere does the Department provide any evidence of voter fraud—much less voter fraud specifically in Ohio.[7] Nor does it offer any data suggesting that voter inactivity, let alone voter inactivity for just two years, indicates either that fraudulent voting is occurring or that the Ohio Supplemental Process prevents or reduces voter fraud in any meaningful way. Indeed, the evidence could not be clearer that voter fraud, the rationale purportedly buttressing these efforts, is virtually nonexistent and, thus, an unreasonable basis for seeking to purge voters from voter rolls. An exhaustive study by an expert at Loyola Law School found only 31 credible incidents of voter fraud out of more than 1 billion votes cast from

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[6] Indeed, "[a]s time elapses, changes in the interpretation of a fixed statute are less likely to reflect the original understanding and intent of the drafters, and more likely to represent the vicissitudes of present-day politics." *Id.* at 10.

[7] Nor does the Department acknowledge that Ohio "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." *Dunn*, 405 U.S. at 351 (rejecting a state's durational residence requirements as over-inclusive and "all too imprecise," and pointing to state's criminal laws as more appropriately addressing voter fraud concerns).

2000 to 2014: a statistically insignificant figure to say the least.[8]

The Department's about-face here—which it admitted was prompted only by a change in Administration—should be seen for what it is: an attempt to hyperextend the limited provisions of the NVRA and HAVA to advance a broader agenda. That agenda is starkly illustrated by the Administration's creation of the President's Advisory Commission on Election Integrity, which appears to date to reflect a transparent effort to manufacture evidence supporting President Trump's false claims that widespread voter fraud cost him the popular vote in the 2016 Presidential election. *See generally* Complaint at 3, 15, *NAACP Legal Defense & Educational Fund, Inc. v. Trump*, No. 1:17-cv-5427, 2017 WL 3046985 (S.D.N.Y. July 18, 2017). The Vice-Chair of that Commission has made clear

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[8] Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Wash. Post, Aug. 6, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast; *see also Myth of Voter Fraud*, Brennan Center for Justice, *available at* https://www.brennancenter.org/issues/voter-fraud ("examination after examination of voter fraud claims reveal fraud is very rare, voter impersonation is nearly non-existent, and much of the problems associated with alleged fraud relates to unintentional mistakes by voters or election administrators"); David Becker, *Just the Facts on Fraud*, Center for Election Innovation and Research, May 1, 2017, *available at* https://www.electioninnovation.org/news/2017/5/1/just-the-facts-on-fraud (finding just 324 potential (unverified) fraud cases, out of more than 29 million ballots cast—a rate of one-thousandth of 1 percent in review of 2016 election in California, North Carolina, Ohio and Tennessee).

that it is animated by hostility to the NVRA, and one of its goals is "putting together information on legislation drafts for submission to Congress early in the [A]dministration . . . regarding amendments to the NVRA . . . ."[9]

Unable, as yet, to amend the NVRA, the Administration is instead misinterpreting it. Lest there be any doubt regarding the relevant sequence of events, the Court need only look at the timeline leading up to the reversal in position here:

> **July 18, 2016** – The Department of Justice submits an amicus brief to the Sixth Circuit in this case arguing the Ohio Supplemental Process "inevitably results in the removal of voters based on non-voting, which violates the NVRA and HAVA." U.S. Sixth Circuit Amicus Brief at 8.
>
> **186 Days Later** – The President assumes office on January 20, 2017.
>
> **385 Days Later** – The Department of Justice submits an amicus brief to this Court in this case on August 7, 2017, arguing that the Ohio Supplemental Process "does not violate the NVRA." U.S. Supreme Court Amicus Brief at 10. The Department simultaneously revises its 2010 formal guidance on the NVRA to reflect its new view. *See id.* at 14 n.4 ("The Department has updated its NVRA

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[9] Mark Joseph Stern, *Kobach Email Confirms Trump Administration's Goal to Gut Vital Voting Rights Law*, Slate, July 18, 2017.

guidance to reflect the interpretation set forth in this brief.").[10]

The capriciousness displayed by the Department must not and should not dictate this Court's interpretation and enforcement of fundamental federal laws seeking "uniform" and "nondiscriminatory" voter maintenance programs. The plain text, structure, and history of the NVRA and HAVA themselves should determine whether Ohio's Supplemental Process is lawful and properly achieves the Acts' goals.

C. The Department's New Ideologically Motivated Position Should Carry No Weight With This Court.

The Department of Justice often duly enjoys this Court's respect when it lends its voice to an issue involving laws it is charged with enforcing. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 231-32 (1996) (noting that in other litigation interpreting the Voting Rights Act, this Court "attached significance to the fact that the Attorney General [in an amicus brief] had urged [the Court] to find that private litigants may enforce the Act" and noting it had again taken that position in the current case) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 n.23 (1969) ("It is significant that the United States [in its amicus brief] has urged that private litigants have standing to seek declaratory and injunctive relief in these suits.")). In-

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[10] The Department's prior guidance was still available the day before it filed its amicus brief with this Court, based on internet archives. https://web.archive.org/web/20170806122814/https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last accessed Sept. 18, 2017).

deed, the government has an open invitation to submit amicus briefs, pursuant to Supreme Court Rule 37.4, because the Court assumes it "almost always will be better able to reflect the public interest." Eugene Gressman, *Supreme Court Practice*, at 737 (9th ed. 2007) (citing Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984) ("Governmental entities are uniquely situated to define and assert the 'public interest,' and their views as amicus will, therefore, carry substantial weight.")). Citizens, States, local governments, public interest organizations, and private businesses are all guided by the Department's position in determining the propriety of their own conduct.[11]

But such respect is not beyond question. It is based on the premise that the Department will represent the public interest, not simply parrot the ideological views of a new Administration. As such, the Department must provide a principled basis for any change in its prior interpretation of federal law. Otherwise, that position deserves no weight.

This Court has rejected the government's change in position where it was in conflict with an earlier position. In *Levin v. United States*, 568 U.S. 503 (2013), for example, this Court rejected the Department's "most unnatural" interpretation of a federal tort statute, which contradicted its historical position on the

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[11] *See* U.S. Dep't of Justice, Voting Rights Policy and Guidance, *available at* https://www.justice.gov/crt/voting-rights-policy-and-guidance ("The Voting Section has published a series of Questions and Answers to the National Voter Registration Act as [an] aid to guide jurisdictions and to inform interested members of the public about the Act's requirements.").

issue. 568 U.S. at 514. The Court observed that, in prior litigation, it "was . . . informed" by the Department's position at the time, and it adopted that position. *Id.* at 517 (citing *United States v. Smith*, 499 U.S. 160, 166 (1991)). Faced with the Department's awkward "disavow[al]" in *Levin* of its prior interpretation and its efforts "to inject ambiguity into [the statute] notwithstanding [the statute's] direction that '[the pertinent section] . . . shall not apply,'" the Court agreed with "the Government's earlier view," and rejected its "freshly minted revision." *Id.* at 518; *see also, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (finding the Department's position "particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today").[12]

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[12] The Court has regularly expressed skepticism of the Department's change of position, across various Administrations, in other contexts as well. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 273 (1981) (rejecting as "wholly unpersuasive" a new agency interpretation at odds with a position the agency had taken for years, noting that "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (citation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"—the Department's change in position was "contrary to the narrow view of that provision advocated in past cases."); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

The Court should take the same approach here and decline to ratify the Department's casting aside of a previous longstanding position without at least some reasonable explanation. The Department, having "reconsidered" its position in light of nothing other than a change in presidential Administrations, brings nothing new to the table. U.S. Supreme Court Amicus Brief, at 14. All it has contributed, "though it is not quite nothing, is [to] let[] [the Court] know," *Sandifer*, 678 F.3d at 599, that it disagrees with the position taken *by the last three Administrations*. Indeed, "[t]his approach [of viewing departures from consistently held positions with skepticism] is faithful to the technocratic vision of agencies, and more importantly, it eliminates the perverse incentive of rewarding Presidents who read statutes in ways unthinkable to their drafters." Blackman, *supra*, at 19.

In fact, the Department's change of course here reflects its ongoing and active abandonment of what is supposed to be an essential mission regardless of who occupies the White House: protecting and enforcing the civil rights of *all* Americans. In just the last eight months, the Department has signaled retreats and reversals on issues ranging from Title VII employment discrimination, to transgender rights in schools, to class action and arbitration waivers in employment contracts.[13]

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[13] *See, e.g.*, Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), ECF No. 417 (Department of Justice taking the position that Title VII does not apply to discrimination based on sexual orientation and indicating that the EEOC was "not speaking for the United States" in taking a contrary position); Unopposed Motion for Voluntary Dismissal, *Texas v. United States*, No. 16-

The Department of Justice also recently has ended a major initiative to strengthen the reliability of forensic science,[14] reversed course regarding a prior mandate against the continued use of private prisons,[15] and ordered a review of consent decrees and reform agreements with local police departments.[16]

11534 (5th Cir. Mar. 2, 2017) (Department of Justice voluntarily dismissing a pending appeal and effectively ending a challenge to a district court's injunction against the federal guidance on transgender students); Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-1300 and Supporting Respondents in No. 16-1307, *NLRB v. Murphy Oil USA, Inc.*, Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017) (Department of Justice reversing position on class action waivers in arbitration agreements); Corrected Brief for Appellees at 2-3, *Chamber of Commerce of U.S. v. Dep't of Labor*, No. 17-10238 (5th Cir. July 3, 2017) (Department of Justice "no longer defending" prior position on arbitration waivers); Reply Brief for Appellants at 22-23, *Nevada v. U.S. Dep't of Labor*, No. 16-41606 (5th Cir. June 30, 2017) (Department of Justice declining to defend the position on Department of Labor overtime rules, as it had in the district court and its opening appellate brief).

[14] Notice of Public Comment Period on Advancing Forensic Science, 82 Fed. Reg. 17,879 (Apr. 13, 2017).

[15] Memorandum from Jefferson B. Session, III, Attorney General, Washington, D.C. on Rescission of Memorandum on the Use of Private Prisons (Feb. 21, 2017), *available at* https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf.

[16] Memorandum from Jefferson B. Sessions, III, Attorney General, Washington, D.C. on Supporting Federal, State, Local, and Tribal Law Enforcement (Mar. 31, 2017). This memorandum was issued shortly before lawyers for the Department of Justice moved a federal court to postpone a hearing on a potential consent decree with the Baltimore Police Department arising out of alleged civil rights abuses. *See* Exhibit 1 of Motion for Continuance of Public Fairness Hearing, *United States v. Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 3, 2017). The motion

Perhaps most relevant to the voting context here, the Department also withdrew its opposition to Texas's voter photo ID law,[17] which it previously and successfully challenged for more than six years as intentionally discriminatory. It did so even though the Fifth Circuit held en banc that the record "contained evidence that could support a finding of discriminatory intent," *Veasey v. Abbott*, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc), and the district court, on remand, recently found that the Texas law at issue was, in fact, enacted with a discriminatory intent, *see Veasey v. Abbott*, No. 2:13-cv-193, 2017 U.S. Dist. LEXIS 54253, at *7 (S.D. Tex. Apr. 10, 2017). While Texas has consistently argued that its voter photo ID law is necessary to combat voter fraud, the Fifth Circuit and the district court expressly rejected that rationale, observing that out of 20 million votes cast in the 10 years before the law was passed, Texas had convicted only two people for in-person voter fraud. *Id.* at *14; *Veasey*, 830 F.3d at 238-39.

Considering this apparent abandonment of civil rights enforcement together with the "most unnatural" reading of the NVRA and HAVA advanced here, this Court should give no weight to the Department's new interpretive approach and should reject it on its merits.

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was denied, Order, *Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 5, 2017), and the District Court later approved a consent decree, Consent Decree, *Police Dep't of Balt. City*, 1:17-cv-00099-JKB (D. Md. Apr. 7, 2017).

[17] United States Motion for Voluntary Dismissal, *Veasey v. Abbott*, No. 2:13-cv-193, 2017. U.S. Dist. LEXIS 54253 (S.D. Tex. Apr. 10, 2017).

* * *

In the end, the Court's decision here will reverberate well beyond the Ohio voters directly impacted by Ohio's Supplemental Process. A holding that States may initiate the removal of a person from a voter registration list because the individual did not vote in previous elections has the potential to spawn a host of new laws imposing burdens on voters to remain eligible to vote, contrary to a principal purpose of the NVRA and HAVA. These new provisions would likely launch a new round litigation to protect eligible voters from burdens imposed by federal, state, and local governments misguidedly aimed at wiping them from the voter rolls and the political process. Indeed, the Department of Justice,[18] the President's Advisory Commission on Election Integrity,[19] other States,[20] and

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[18] In late June 2017, the Department of Justice, outside of any customary practice, sent letters to state boards of elections officials seeking information about their list maintenance procedures under the NVRA. *See, e.g.*, Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep't of Justice to the Honorable Kim Westbrook Strach, Executive Director, State Board of Elections, North Carolina (June 28, 2017), https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html.

[19] The Commission has sent letters to all fifty States asking them to provide detailed information about voters. Michael Wines & Rachel Shorey, *Inside the Uproar Over a Government-Led Search for Voter Fraud*, N.Y. Times, July 8, 2017, at A4. The Commission has indicated that it intends to run this data against other available databases to determine "areas where voter rolls could be strengthened." *Id.*

[20] For example, Indiana recently enacted a voter removal provision that goes even further than Ohio's Supplemental Process at issue here and has already been challenged under the NVRA.

private organizations[21] are already systematically exploring new ways to purge voters from the rolls.

For these reasons, this Court should be especially careful in formulating its decision here, particularly in light of the Department of Justice's extraordinary one-hundred and eighty degree turn and the broader drive to purge the rolls and undermine the franchise.

CONCLUSION

For more than two decades, the Department of Justice has advocated that the NVRA and HAVA prohibit state laws that, like Ohio's Supplemental Process, trigger a voter removal process based solely on a voter's inactivity. The Department's sudden reversal in this case was prompted by nothing other than a change in Administration and arises amid broader efforts to disenfranchise millions of American voters, including in increasingly Black and Brown communities that have made historic strides in accessing the voting booth. The Department's new position, reflecting no justifiable change in law or fact, should be rejected by and carry no weight with this Court.

The Sixth Circuit correctly held, consistent with the Department's longstanding position, that Ohio's

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Complaint, *Ind. State Conf. of NAACP v. Lawson*, No. 1:17-cv-02897 (S.D. Ind. Aug. 23, 2017).

[21] Pema Levy, *These Three Lawyers Are Quietly Purging Voter Rolls Across the Country*, Mother Jones, July 7, 2014 (describing how an organization has initiated inquiries in at least 141 counties in 21 states questioning the accuracy of voter rolls, filing lawsuits in instances where counties have refused to accede to certain demands, and often targeting counties with significant Black communities and other communities of color, including in rural Mississippi and Texas).

Supplemental Process violates the NVRA and HAVA, and this Court should affirm that judgment.

Respectfully submitted,

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RECORD AND BRIEFS

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE OHIO STATE CONFERENCE OF THE NAACP IN SUPPORT OF RESPONDENTS

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Common Cause of Colo. v. Buescher,
750 F. Supp. 2d 1259 (D. Colo. 2010) 4

League of Women Voters of Ohio v. Brunner,
548 F.3d 463 (6th Cir. 2008) 3, 7, 10, 12

NC NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016).....2

NEOCH v. Husted,
696 F.3d 580 (6th Cir. 2012) 10

Northeast Ohio Coalition for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016).....3

Obama for America v. Husted,
697 F.3d 423 (6th Cir. 2012) 3, 8

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016).....3

Cited Authorities

Page

Ohio State Conference of the NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014), *vacated as moot*,
2014 WL 10384647 (6th. Cir. Oct. 1, 2014). 2, 7, 9

Reynolds v. Sims,
377 U.S. 533 (1962). 2

South Carolina v. Katzenbach,
383 U.S. 301 (1966). 3

State ex rel. Painter v. Brunner,
128 Ohio St. 3d 17, 941 N.E. 2d 782 (2011) 10

Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell,
388 F.3d 547 (6th Cir. 2004) 7

Texas NAACP v. Steen,
71 F. Supp. 3d 627 (S.D. Tx. 2014) 3

United States v. Ortiz,
897 F. Supp. 199 (E.D. Pa. 1995) 23

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. XV. 6

52 U.S.C. § 20501. 4

2005 Ohio Laws 40 (Sub. H.B. 234). 8

Cited Authorities

Page

Act of Apr. 16, 1868, § 1, 1868 Ohio Gen. & Loc. Laws 1st Sess. 97 (L.D. Myers & Bro. 1868) 6

Alice Miranda Ollstein and Kira Lerner, Think Progress, *"Republicans were wildly successful at suppressing voters in 2016"* (Nov. 15, 2016).....13

America Goes to the Polls 2014, Nonprofit Vote . . .20, 21

Andy Sullivan and Grant Smith, *Use it or Lose it: Occasional Ohio Voters May Be Shut Out in November*, Reuters (June 2, 2016).....18

Billy Corriher and Liz Kennedy, Ctr. for Am. Progress, *Preventing Problems at the Polls: Ohio* (Oct. 11, 2016) 12

Darrel Rowland, *Voting in Ohio | Fight over poll hours isn't just political*, The Columbus Dispatch (Aug. 19, 2012) 9

Earl Letourneau, U.S. Census Bureau, Mail Response/Return Rates Assessment (2012).....22

Emily Badger, *Why Long Voting Lines Could Have Long-Term Consequences*, N.Y. Times (Nov. 8, 2016).....12-13

Emily L. Mahoney, Hillary Davis, and Jimmy Miller, Ctr. for Public Integrity, *America Scrubs Millions from the Rolls. Is it Fair?* (Aug. 22, 2016).....38

Cited Authorities

Page

H.R. Rep. No. 103-9 (1993) 4

Hannah Yi, Mori Rothman and Chris Bury, PBS Newshour, *Why Ohio has purged at least 200,000 from the voter rolls* (July 31, 2016) 19

Hawaii Rev. Stat. §11-12 (2016) 25

Hawaii Rev. Stat. §11-17 25

Jackie Borchardt, *Ohio lawmaker wants the state to stop purging inactive voters*, Cleveland.com (Dec. 2, 2015) 23-24

Jens Manuel Krogstad and Mark Hugo Lopez, Pew Research Ctr.: Fact Tank, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots* (May 12, 2017) 15

Jens Manuel Krogstad, Pew Research Ctr., *Asian American voter turnout lags behind other groups; some non-voters say they are 'too busy'* (Apr. 9, 2014) 16

John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390 (1997) 23

Joshua Field, Charles Posner, and Anna Chu, Ctr. for Am. Progress, *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots* (Oct. 2014) 12

Cited Authorities

Page

Kristen Taylor & Alexandra Eichler, *Voting Problems in Ohio, Texas According to Election Protection Volunteers*, Huffington Post (Nov. 6, 2012).....11

Lauren Harmon, Charles Posner, Michele Jawando, and Matt Dhaiti, Ctr. for Am. Progress Action Fund, *The Health of American Democracies* (July 2015) 12

Michael P. McDonald, *2012 Turnout: Race, Ethnicity and the Youth Vote*, Huffington Post (July 8, 2013) 14

Michael Powell and Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Wash. Post (Dec. 15, 2004) 10, 11

Nathan Eagle, *Should Hawaii Purge More People from List of Registered Voters?* Civil Beat (Oct. 20, 2014).....25

O.G.C.A. § 21-2-233 24

O.G.C.A. § 21-2-234(a).....24

Ohio Rev. Code § 3503.21(A)(7).....5

Ohio Rev. Code § 3503.21(B) 5

Ohio Rev. Code § 3505.20.....6

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Ohio Rev. Code § 3509.01(B)(2) 9

Ohio Rev. Code § 3509.01(B)(3) 9

Ohio Rev. Code § 3509.05(A) 8

Ohio Rev. Code § 3509.32 12

Ohio Sen. Nina Turner and Ohio Rep. Kathleen Clyde, *Voter Suppression in Ohio in the November 2012 Election* (June 5, 2013).....11

Peter S. Canellos, *In Prosecuting Federal Crime, Jury Pool can be an Issue of Race*, Boston Globe (Sept. 20, 2005) 23

Robert Walters and Mark Curriden, *A Jury of One's Peers?: Investigating Underrepresentation in Jury Venires*, 43 Judges' Journal (2004).....22

Summit County Board of Elections Challenge Hearings, Oct. 28, 2004, Tr. 72:23-73-12.....7

Sup. Ct. R. 37.2 1

T.C.A. §2-2-106(c) (2010) 24

Tea Party Group Works to Remove Names from Ohio Voter List, LA Times (Sept. 26, 2012) 7

Cited Authorities

Page

Ted Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813 (2001) 23

The Other Side: Lot Wright Shows How the Negroes Were Frightened from the Polls, Fort Worth Daily Gazette (Jan. 16, 1885) 6

Thom File, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (May 10, 2017) 13, 15

Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014* (July 2015) 17

U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin; from States; U.S. Census Bureau, Current Population Survey* (Nov. 2016) 16

U.S. Census Bureau, *Voting and Registration of the Election of November 2016* (May 2017) . . .15, 20, 21

U.S. Election Assistance Commission Report to the 114th Cong.: *The 2014 EAC Election Admin. and Voting Survey Comp. Rept.* (June 30, 2015) 25

Cited Authorities

Page

Wendy Weiser & Margaret Chen, Brennan Center for Justice, *Voter Suppression Incidents in 2008* (Nov. 3, 2008).....11

William H. Frey, *Census Shows Pervasive Decline in 2016 Minority Voter Turnout*, Brookings Institution (May 18, 2017) 13, 14

Zachary Roth, *After early voting cuts, Souls to the Polls takes a hit in Ohio*, MSNBC (Nov. 3, 2014).....9

Pursuant to Supreme Court Rule 37.2, the National Association for the Advancement of Colored People ("NAACP") and the Ohio State Conference of the NAACP ("OH NAACP") respectfully submit this *amici curiae* brief in support of Respondents in this matter.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The NAACP is a non-profit organization founded on the goal of achieving an equitable society for African-Americans and communities of color. The right to vote is under constant threat of being diminished to a privilege instead of a guarantee to all United States citizens. Former Assistant Attorney General Deval Patrick's letter to the Senate Judiciary Committee on the nomination of Jeff Sessions to be Attorney General highlights the triumphs of past voting rights cases and emphasizes the danger when the "rule of law is imperiled." "Voting," as he writes, "is a civic and even sacred right in our country." The NAACP's core mission is to protect the right to vote, and the organization has spent all 108 years of its existence in pursuit of that goal.

The OH NAACP serves as the statewide arm of the NAACP, one of the country's oldest racial justice organizations. The OH NAACP works toward eliminating race-based discrimination and has done so for almost

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of all amicus briefs in this matter.

a century. Throughout its history, the OH NAACP has actively fought for voting rights, most recently and prominently in the 2014 case, *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated as moot*, 2014 WL 10384647, at *1 (6th. Cir. Oct. 1, 2014). The OH NAACP has invested significant resources in the efforts to expand American democracy and increase participation in the electoral process.

In Ohio, *amici* have worked arduously to fulfill the protections of the U.S. Constitution and ensure that the voices of Ohio's voters are heard at the polls. The organization is dedicated to securing the fundamental right to vote for those who have been historically silenced. *Amici* submit this brief to help the Court appreciate and understand the negative impact of Ohio's Supplemental Process and similar provisions in other states on the African American community and voters of color.

INTRODUCTION AND SUMMARY OF ARGUMENT

Despite centuries of struggle, the sacred right to vote continues to evade a large number of voters of color in the United States. As the Court has recognized, the right of suffrage is fundamental to a free and democratic society. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1962). Although advances have been achieved in the fight to secure the right to vote for all citizens, the ability to participate fully in U.S. democracy still eludes far too many voters, particularly voters of color due to suppressive state tactics.[2] This Court has long recognized that racial

2. Recent examples include *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (challenging voter suppression law passed

discrimination in the administration of elections is unconstitutional. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). This denial of the right to vote is especially troubling, considering the various forms of physical violence that people of color have faced over the years in their attempts to register and vote. *See, e.g., Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 639-651 (6th Cir. 2016) (Keith, J., dissenting).

While overt acts of violence have been used historically to deny the vote, today more insidious means of restricting access to the ballot are common. Ohio has a long history of barriers to the ballot, as demonstrated by consistent cuts to same-day registration and early in-person ("EIP") voting. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 624 (6th Cir. 2016). Ohio has designed and fostered a system of voting that creates impermissible administrative barriers, such as long lines and unwarranted voter challenges that disproportionately impact voters of color. *See Obama for America v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012) (affirming preliminary injunction preventing Ohio from cutting early voting). The United States Court of Appeals for the Sixth Circuit previously noted that during the 2004 election, Ohioans faced long lines and wait times, sometimes stretching into the early morning the following day. *Id.* at 426. In recent years, additional burdens that affect access to the ballot have emerged, such as poll worker errors and problems with provisional ballots. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008).

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by the North Carolina General Assembly), and *Texas NAACP v. Steen*, 71 F. Supp. 3d 627 (S.D. Tx. 2014) (ongoing challenge to a discriminatory voter ID law in Texas). *See also* http://brennancenter.org/legal-work/naacp-v-steen (summarizing the timeline of events and litigation related to *Steen*).

In response to these problems, Ohio adopted a promising measure called Golden Week, which greatly extended same day registration and early voting opportunities for Ohioans. *See NAACP*, 768 F.3d at 531. Black voters utilized the early voting allowed by Golden Week at higher rates than White voters. *Id.* at 534. In spite of the law's success, Ohio then eliminated Golden Week. Voting rights advocates challenged the state's action in an effort to preserve the program's monumental gains. *Id.* These barriers to voting in Ohio have chilled the vote in communities of color.

The National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*, sought to establish a system that extended the right to vote to Americans who had been previously shut out of the democratic process. Congress passed the NVRA with two priorities in mind: an assurance that as many citizens as possible could register and participate in federal elections, and an accurate maintenance of state voter rolls. *See A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 705 (6th Cir. 2016) ("*APRI*") (quoting *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1274 (D. Colo. 2010)). The Sixth Circuit acknowledged the tension between the two primary purposes of the NVRA, but also noted that one of the guiding principles of the law is to ensure that, once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction. *Id.* at 706; *see also* H.R. Rep. No. 103-9, at 18 (1993). The Sixth Circuit's analysis confirms that the NVRA was signed into law with the intent of securing and expanding the right to vote. Unfortunately, the Ohio Secretary of State's misapplication of the NVRA continues the pattern of denying the right to vote to communities of color.

The NVRA is clear: a State cannot begin registration removal proceedings on the basis of an individual's failure to vote in an election. Yet, Ohio adopted the voter maintenance procedure at issue in this case, known as the Ohio Supplemental Process, which does just that. *See* Ohio Rev. Code § 3503.21 (A)(7) & (B). The Sixth Circuit agreed, holding that the Ohio Supplemental Process violates Section 8, subsection (b)(2) of the NVRA. *APRI*, 838 F.3d at 712. As set forth below, Ohio's Supplemental Process follows a long line of suppressive tactics that have limited participation in the electoral process of countless Ohio voters of color. Indeed, a direct connection exists between Ohio's suppressive tactics–such as the elimination of Golden Week, voter challenges, and long lines at the polls—and the inactivity that, through the Supplemental Process, results in the removal of voters from registration rolls. *Amici* also address the impact of mail delivery on the inactivity of voters of color, which may contribute to a voter's lack of response to correspondence from the state. In sum, *amici* contend that the Ohio Supplemental Process violates the language of the NVRA and disproportionately impacts voters of color. For these reasons, *amici* respectfully request affirmance of the Sixth Circuit's decision that the Supplemental Process violates the NVRA.

ARGUMENT

I. OHIO'S SUPPRESSIVE VOTER TACTICS DENY THE RIGHT TO VOTE

A. History of Voter Suppression in Ohio

Historically, voters of color in Ohio have faced suppressive tactics that have led to voter inactivity. Ohio's voter challenge statute, Ohio Rev. Code § 3505.20, for instance, descends from laws explicit in their intent to exclude African Americans from voting. *See* Act of Apr. 16, 1868, § 1, 1868 Ohio Gen. & Loc. Laws 1st Sess. 97, 97 (L.D. Myers & Bro. 1868) ("[I]t shall be the duty of the judges of election to challenge any person offering to vote at any election held under any law of this state, having a distinct and visible admixture of African blood.").

Even after the enactment of the Fifteenth Amendment in 1870, Ohioans continued to use poll challenges that impeded and intimidated African American voters.[3] As recently as 2004, Ohio's voter challenge laws have been used to deliberately target African American and other voters of color. For example, ahead of the 2004 general election, the Summit County Board of Elections dismissed as unfounded nearly a thousand citizen voter challenges. During a hearing to address those challenges, a Board member called for reform of the citizen challenge statute

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3. *See The Other Side: Lot Wright Shows How the Negroes Were Frightened from the Polls*, Fort Worth Daily Gazette (Jan. 16, 1885) at 5, http://chroniclingamerica.loc.gov/lccn/sn86064205/1885-01-16/ed-1/seq-5/ (describing how numerous African American voters were challenged, and one voter attacked, during a recent Cincinnati election).

asserting that it served as an artifact of Jim Crow-era discrimination. *See* Summit County Board of Elections Challenge Hearings, Oct. 28, 2004, Tr. 72:23-73-12.

1. Voter Challenges

While Ohio amended its challenge law to prohibit private citizens from challenging voters inside the polls in 2006, poll watchers and pre-election challenges continued to target African Americans disproportionately.[4] The vigorous use of same-day voter challenges have created long lines, delays, and confusion at the polls. *See Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). While they do not directly deprive voters of their franchise, such challenges contribute to conditions that deter and discourage voters from turning out at the polls.

2. Long Lines and Poll Worker Error

Long lines and poll worker errors have also disproportionately impacted the ability of people of color to vote in Ohio. *See League of Women Voters of Ohio*, 548 F.3d at 468-69 ("Insufficient voting machines and long wait times...caused many voters to leave without voting to attend work, school, or provide care to family members. Poll workers did not inform these voters of their right to

4. *See NAACP*, 768 F.3d at 556 (listing the use of poll watchers as a recently implemented voting practice that suppresses political participation in communities of color); *see also Tea Party Group Works to Remove Names from Ohio Voter List*, LA Times (Sep. 26, 2012), http://articles.latimes.com/2012/sep/26/nation/la-na-ohio-voting-fight-20120927 (describing voter challenges aimed at African Americans in counties President Obama won in 2012).

vote by paper ballot."). In response to these problems, Ohio passed Substitute House Bill 234, which greatly expanded early voting. *See* 2005 Ohio Laws 40 (Sub. H.B. 234). With the enactment of HB 234, Ohio voters had the option of voting early via an "absentee ballot," which may be cast either EIP or by mailing the ballot to the Board of Elections. Ohio Rev. Code § 3509.05(A).

3. Golden Week

Further, under the 2005 early-voting scheme, the Boards of Election were required to make absentee ballots available for voters—either for EIP voting or by mail voting—no later than 35 days before the election, effectively providing a five-day window wherein Ohio voters could register and vote on the same day ("Golden Week"). *See NAACP*, 768 F.3d at 556. A large number of Ohio voters utilized the new Golden Week voting procedures. *See Obama for America*, 697 F.3d at 426 (noting that approximately 1.7 million Ohioans cast their ballots before election day during the 2008 general election, amounting to 20.7% of registered voters and 29.7% of total votes cast). Data from Cuyahoga and Franklin Counties, the two counties with the highest percentage of African American residents, suggests that early voters were disproportionately African American. *Id.* (82% of EIP votes in Franklin County were cast after hours on weekdays, on the weekend, or on the Monday before the election).

Ohio then sharply curtailed Golden Week registration and voting opportunities with the issuance of Directive 2012-35, which significantly reduced weekend voting hours, and the passage of SB 238, which effectively

eliminated Golden Week. Ohio Rev. Code § 3509.01(B)(2)-(3). The elimination of Golden Week, and the cuts to weekend and evening voting hours further burdened lower income and African American voters who are more likely to rely on public transportation and wage-based jobs, making them less likely to be able to vote in the hours permitted at the one early-voting location in each county. *See NAACP*, 768 F.3d at 539; *Obama for America*, 973 F.3d at 433 ("early voters tend to be members of demographic groups that may be unable to vote on Election Day or during the workday at local boards of elections because of work schedules."). The decision to end Golden Week significantly affected voter turnout in Black communities when the hours were cut for voting the last Sunday before Election Day.[5] Historically, Black churches, organized "Souls to the Polls" during Golden Week to transport Black voters unable to vote on Election Day due to work restrictions or who lacked transportation.[6]

The fact that reduced evening and weekend voting opportunities disproportionally affects African American voters was no secret. Discussing his vote to shorten polling hours, a member of the Franklin County Election Board commented, "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter turnout machine."[7]

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5. Zachary Roth, *After early voting cuts, Souls to the Polls takes a hit in Ohio*, MSNBC (Nov. 3, 2014), http://www.msnbc.com/msnbc/ohio-early-voting-cuts-souls-the-polls-takes-hit.

6. *Id.*

7. Darrel Rowland, *Voting in Ohio | Fight over poll hours isn't just political*, The Columbus Dispatch (Aug. 19, 2012), http://www.dispatch.com/content/stories/local/2012/08/19/fight-over-poll-hours-isnt-just-political.html.

4. Provisional Ballots

Provisional ballot challenges have been yet another source of disenfranchisement of voters of color in Ohio. *See League of Women Voters*, 548 F.3d at 467 (noting that 22% of provisional ballots were not counted in the 2004 general election, with the percentage ranging from 1.5% to 39.5% from county to county). Prior to the Sixth Circuit's decision in *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), and the enactment of SB 216, Ohio disqualified provisional ballots cast in the correct polling location, but the wrong precinct. The state did not make exceptions for poll-worker error, even though nearly all such ballots were cast as a result of poll-worker error, such as providing the voter with a provisional ballot for the wrong precinct. *See State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 941 N.E. 2d 782, 794 (2011) (per curiam). This process resulted in 14,355 provisional ballots being thrown out in 2008, and 11,775 in 2010 despite having been cast in the correct polling place.[8]

Even after Ohio was required to count these so-called "right church, wrong pew" ballots, it has continued to discard provisional votes cast within the correct county, but at the wrong polling place. A report by two Ohio state legislators regarding the 2012 election determined that 9,483 ballots were thrown out as a result of poll workers directing voters to the wrong polling place (and nearly

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8. *See NEOCH*, 696 F.3d at 585; *see also* Michael Powell and Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Wash. Post, A01 (Dec. 15, 2004) (reporting that in the 2004 election in Cleveland, "poorly trained poll workers apparently gave faulty instructions to voters that led to the disqualification of thousands of provisional ballots and misdirected several hundred votes to third-party candidates.").

3,000 were rejected simply because the voter failed to print or sign their name in two places on the outside of the ballot envelope).[9]

5. Other Election Administration Errors

Other systemic failures in administering elections – which would give rise to inactive voters – are well-documented in Ohio. In 2004, for example, malfunctioning voting machines, uninformed poll workers, and malapportionment of resources in high-population-density neighborhoods all contributed to an election cycle where hundreds of voters stood in lines for up to ten hours to cast their ballots.[10] During the 2008 election, Ohio failed to offer voter registration at public assistance offices and attempted to deny absentee ballots to people with mismatching state and voting-information records.[11] In 2012, Ohio reduced the number of polling places to save on costs. This increased the number of voters in each precinct, with much of this overcrowding occurring in neighborhoods populated with people of color.[12]

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9. Ohio Sen. Nina Turner and Ohio Rep. Kathleen Clyde, *Voter Suppression in Ohio in the November 2012 Election* (June 5, 2013).

10. Powell & Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio,* Wash. Post, A01 (Dec. 15, 2004).

11. Wendy Weiser & Margaret Chen, Brennan Center for Justice, *Voter Suppression Incidents in 2008* (Nov. 3, 2008).

12. Kristen Taylor & Alexandra Eichler, *Voting Problems in Ohio, Texas According to Election Protection Volunteers,* Huffington Post (Nov. 6, 2012).

Additional errors include registered voters not appearing on voting rolls in their precincts; improper denials of requests for absentee ballots; election officials providing voters with incorrect information about polling places; early closure of polling places; poll workers sending voters away without voting contrary to Ohio Rev. Code § 3509.32, which permits anyone in line as of closing time to vote; poll workers not providing provisional ballots where necessary, running out of provisional ballots or envelopes, or never having any at all. *See League of Women Voters*, 548 F.3d at 469. All of these measures, while varied, have a similar result – disenfranchising Black voters.

B. Ohio's History of Suppressive Voting Measures Has Led to Decreased Voter Engagement and Inactive Voters

Ohio's long history of voter suppression tactics has led to the denial of access to the ballot for many voters in the state. A 2015 Center for American Progress report ranked Ohio 37th in the nation in "accessibility of the ballot."[13] Reduced access to the ballot box has resulted in a pronounced and disparate impact on voters of color, decreasing their participation in the electoral process.[14]

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13. Billy Corriher and Liz Kennedy, Ctr. for Am. Progress, *Preventing Problems at the Polls: Ohio* (Oct. 11, 2016), https://www.americanprogress.org/issues/democracy/reports/2016/10/11/145796/preventing-problems-at-the-polls-ohio.

14. Lauren Harmon, Charles Posner, Michele Jawando, and Matt Dhaiti, Ctr. for Am. Progress Action Fund, *The Health of American Democracies* at 12, 15, 18-19, 22, 23 (July 2015); *see also*, Joshua Field, Charles Posner, and Anna Chu, Ctr. for Am. Progress, *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots* (Oct. 2014); Emily Badger, *Why*

1. A Decline in Black Voter Participation in Ohio in 2016 Reflects the Impact of Voter Suppression

In the 2016 general election, Ohio saw a decline in Black voter participation rates comparable to the national decrease in Black voter turnouts, despite overall record national turnout among total voters.[15] The 2016 election was only the second since 1980 in which the share of Black voters decreased.[16] This decrease, from 12.9% in 2012 to 11.9%, is a reversal from 2012's precedent-setting Black turnout rate, which exceeded that of whites for the first time in recorded history.[17] The decline in rate and share of

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Long Voting Lines Could Have Long-Term Consequences, N.Y. Times (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/upshot/why-long-voting-lines-today-could-have-long-term-consequences.html; Alice Miranda Ollstein and Kira Lerner, Think Progress, "*Republicans were wildly successful at suppressing voters in 2016*" (Nov. 15, 2016), https://thinkprogress.org/2016-a-case-study-in-voter-suppression-258b5f90ddcd.

15. William H. Frey, *Census Shows Pervasive Decline in 2016 Minority Voter Turnout*, Brookings Institution (May 18, 2017), https://www.brookings.edu/blog/the-avenue/2017/05/18/census-shows-pervasive-decline-in-2016-minority-voter-turnout.

16. Between 2000 and 2004, the share of Black voters also decreased. Recent voting rates among Latinos, Asian Americans, and Pacific Islanders have been below those of White and Black voters, ranging from 5 to 20 percentage points lower. Thom File, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (May 10, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

17. When survey non-respondents are removed from turnout rate calculations, the Black vote first exceeded White turnout

the Black turnout is noteworthy, given slight increases in the Black share and number of eligible voters.[18] The data describes lower rates of Black voter turnout as compared to Whites nationally and in numerous states, including Ohio.[19] The 2016 election findings deepen concerns about voter suppression, in light of the sharp decline of voting rates among Black voters and other voters of color, even as White voting rates increased. Moreover, the decrease in Black voter participation increases the likelihood that Black voters will be designated as inactive, which initiates removal from the voter rolls. In line with Ohio's past practices, the current procedures continue to present unfortunate barriers to voting in communities of color, in turn leading to voter inactivity.

2. Disenfranchisement Results in Low Voter Participation Rates in Communities of Color

Persistently low voter participation among people of color reflects a lack of equitable access to the ballot

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in 2008. Michael P. McDonald, *2012 Turnout: Race, Ethnicity and the Youth Vote*, Huffington Post (July 8, 2013), http://www.huffingtonpost.com/michael-p-mcdonald/2012-turnout-race-ethnict_b_3240179.html.

18. "For the first time in more than a decade, the black share of voters declined, compared to the previous election—from 12.9 percent in 2012 to only 11.9 percent in 2016. This occurred despite a small rise in eligible black American voters." William H. Frey, *Census Shows Pervasive Decline in 2016 Minority Voter Turnout*, Brookings Institution (May 18, 2017), https://www.brookings.edu/blog/the-avenue/2017/05/18/census-shows-pervasive-decline-in-2016-minority-voter-turnout.

19. *Id.*

and results in perpetual exclusion from the democratic process. A process that triggers removal of voters from the registration rolls for not voting exacerbates this problem. Nationally, from the 1980s to the present, with just two notable exceptions, voter turnout rates have consistently been lower for people of color than White voters.[20]

The 2016 presidential election held consistent with the historical trend; voting rates were comparatively lower among people of color than Whites: Whites voted at a rate of 65.3%, Blacks at 59.6%, Hispanics at 47.6%, and all others at 49.3%.[21] For people of color, these rates fall below the national voting rate of 61.4%.[22] The national decline in Black voter turnout was accompanied by a decline in the total number of Black voters.[23] In Ohio, voting rates

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20. In 2008, the voting rate among White voters was 66.1 %, Black non-Hispanic 64.1%, Hispanic 8.0%, all other 49.9%. In 2012, the rates were as follows: White 59.6%, Black 66.6%, Hispanic 48%, and other 49.9%. The higher rates of participation in communities of color in 2012 were widely associated with support for Barack Obama and excitement in the African American community about voting for the first Black president. Thom File, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (May 10, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

21. U.S. Census Bureau, *Voting and Registration of the Election of November 2016* (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

22. *Id.*

23. Jens Manuel Krogstad and Mark Hugo Lopez, Pew Research Ctr.: Fact Tank, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots* (May 12, 2017),

in 2016 among eligible Asian and Hispanic voters were also dramatically lower than for Whites, who registered at 72.4% and voted at 64.2%, compared to just 53.1% of Asians registered, and 46.8% who voted, while 68.9% of Hispanics registered and just 57.8% voted.[24] These low voting rates provide clear evidence that voters of color consistently participate less in elections than White voters.

Voter participation data from mid-term elections over past decades shows similar lower voting rates among communities of color. From 2002-2010, mid-term voting rates among Black voters ranged from around 42-44%, while Whites voted at 48.6% or higher.[25] This voting disadvantage is found among not only Black voters, but other communities of color as well. In the same period, 2002-2010, Latino and Asian mid-term election voting rates hovered around 31%.[26] Census reports show that in 2014, Black/non-Hispanics voted at a rate of 40.6% and Hispanics at a woeful 27% in Congressional elections,

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http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots.

24. U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin; from States; U.S. Census Bureau, Current Population Survey* (Nov. 2016).

25. Jens Manuel Krogstad, Pew Research Ctr., *Asian American voter turnout lags behind other groups; some non-voters say they are 'too busy'* (Apr. 9, 2014), http://www.pewresearch.org/fact-tank/2014/04/09/asian-american-voter-turnout-lags-behind-other-groups-some-non-voters-say-theyre-too-busy.

26. *Id.*

compared to 45.8% of Whites.[27] The low mid-term voter participation rates reveal that low or suppressed turnout of voters of color is a perennial issue.

In sum, this compilation of election data shows an enduring problem of inactivity at the polls by communities of color. These undeniable historical statistics suggest that voter inactivity is due to institutional challenges, not idiosyncratic factors. In part, these low participation rates are a consequence of the adoption and implementation of unfair election laws and policies, past and present, that have denied historically disenfranchised voters of color the ability to participate at national average levels or at levels commensurate with White voters. The low voting rates among voters of color is undoubtedly a result of decades of complete exclusion from the franchise, followed by a litany of voter suppression practices, carried on by the Supplemental Process at issue here.

II. OHIO'S SUPPLEMENTAL PROCESS HAS A DISPROPORTIONATE IMPACT ON BLACK VOTERS

A. Ohio's Supplemental Process Has Disproportionately Purged Voters of Color from Registration Rolls

Data on the removal of voters from registration rolls due to Ohio's Supplemental Process demonstrates that the

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27. Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014* (July 2015), http://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

measure disproportionately affects voters of color. These voters are routinely removed from the rolls in higher percentages than their White counterparts.

For instance, one study found voters in certain neighborhoods in the three most populous and diverse counties in the state were up to 200% more likely to be removed from voting rolls as a result of the Supplemental Process.[28] Hamilton County presents a grave contrast: African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity, compared to only 4% of voters in a suburban, majority-white neighborhood.[29] A similar pattern appears in Ohio's two other large, urban counties. In Cuyahoga County, which includes Cleveland, 5 percent of voters in neighborhoods in which President Obama received 60 percent or more of the vote in 2008 were removed. By contrast, only 2.5 percent of voters were removed in neighborhoods where President Obama received less than 40 percent of the vote. Even Ohio's capital was not immune. In Franklin County, home of Columbus, 11 percent of voters in Democratic-leaning neighborhoods have been removed for inactivity since 2012. Yet only 6 percent of voters in Republican-majority neighborhoods were removed.[30]

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28. Andy Sullivan and Grant Smith, *Use it or Lose it: Occasional Ohio Voters May Be Shut Out in November*, Reuters (June 2, 2016), http://www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D (hereinafter "Reuters Report").

29. *Id.*

30. *Id.*

Placed within this context, it is not surprising that Ohio's efforts to purge voter rolls have fallen disproportionately on voters of color. The five largest counties in Ohio contain nearly 73 percent of all African Americans living in Ohio, and these large counties have been the disproportionate target of voter purges. One analysis found that Ohio's twenty most populous counties had purged more than 200,000 names from voter roles for inactivity in 2015 alone, and that Ohio's single largest county, Cuyahoga, accounted for more than 25 percent of these purges, or nearly 52,000 names.[31] Investigators have also noted that in Hamilton County, African American neighborhoods near downtown Cincinnati have had more than ten percent of the registered voters purged for inactivity since 2012, while in the more affluent (and whiter) suburbs that ring the city, only four percent of voters have been purged due to inactivity.[32]

In sum, Ohio's purge process is yet another barrier, in a long history of hurdles, to participation in the electoral process by voters of color.

B. Ohio's Supplemental Process Is Based on a Faulty Correlation Between Voter Inactivity and Voter Change of Address

Ohio's Supplemental Process wrongly equates not voting with a change of address. The Secretary of State

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31. Hannah Yi, Mori Rothman and Chris Bury, PBS Newshour, *Why Ohio has purged at least 200,000 from the voter rolls* (July 31, 2016), http://www.pbs.org/newshour/bb/inside-ohios-fight-voting-rules.

32. *See* Reuters Report.

submits that "[Ohio's Supplemental Process] 'seeks to identify electors whose *lack of voter activity* indicates they may have moved, even though their names did not appear' in the change-of-address database."[33] As explained above, Ohio's history of voter suppression mechanisms has led to high levels of inactivity among voters of color. Moreover, the state provides no evidence that "not voting for 2 years" is a reasonable proxy for "having moved out of one's voting jurisdiction." And the NVRA and HAVA statutes prohibit any assumption that lack of voter activity equates to a change of address for triggering voter removal from registration rolls. While certainly *some* voters have moved, Ohio offers no substantiation for a generalization that voting activity or inactivity bears any direct, cause-or-consequence, or implied relationship with their moving or remaining at their address.

Numerous factors may contribute to a voter missing an election, including: schedule conflicts, inability to get off work, forgetfulness, lack of transportation to the polls, being out-of-town, sickness, dissatisfaction with candidates, apathy, etc.[34] By using "not voting" as the trigger for removal, and given the historic over-representation of voters of color among those not voting, this process inevitably impacts voters of color disproportionately. Given this community's lower turnout

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33. Petition for *Writ* of *Certiorari* at 10 (citation omitted).

34. *America Goes to the Polls 2014*, Nonprofit Vote, http://www.nonprofitvote.org/documents/2015/03/america-goes-polls-2014.pdf; *see also* U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, Table 10, Reasons for Not Voting, by Selected Characteristics: November 2016 (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

rates, the Supplemental Process has and will continue to result in disproportionately higher removal rates of Black voters.

Indeed, Ohio's Supplemental Process perpetuates the problem of low turnout, leading to greater inactivity. In 2016, analysts found the "largest barrier to voting" is related to proper registration.[35] The Ohio Supplemental Process exacerbates this problem by adding an administrative burden and *removing* voters who have already managed successfully to register. Again, voters of color are disproportionately impacted. By adding this removal process to the ongoing challenge of comparatively lower registration rates, Ohio creates yet another impediment to voters of color to remain registered and vote.[36]

C. The Supplemental Process's Mail Response Requirement Disproportionately Places Voters of Color on the Inactive List

The Supplemental Process requires that registered voters who are placed on the inactive list take an additional action—respond to a confirmation notice via U.S. mail—in order to stay on the rolls. While use of the mail to provide notices is prescribed under the Help America Vote Act of 2002 (HAVA) and the NVRA, the evidence related to use of mail suggests that the addition of a mail voter response

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35. *America Goes to the Polls 2014*, Nonprofit Vote, at 19.

36. "In 2016 in the United States, the voting rate for Non-Hispanic Whites was 65.3% while only 59.4% of Blacks and 47.6% of Hispanics voted." U.S. Census Bureau, *Voting and Registration*, https://thedataweb.rm.census.gov/TheDataWeb_HotReport2/voting/voting.html.

requirement for registered voters has an especially harsh impact on voters of color. Mail response and return rates suggest that non-white racial groups return mail at rates lower than the national total and are under-represented in mail returns when compared to their race's percentage of total households in America.[37] As one study explained, "[w]hen Hamilton County, Ohio, where Cincinnati is the county seat, removed 75,000 voters this year, nearly half, and in some neighborhoods far more, were purged because of 'non-response' [. . . and there was a] connection between the poverty rate and racial composition of ZIP codes in the county and the purge rates of registered voters."[38]

Further, a study conducted in 2000 on jury summonses, which are sometimes generated using voter registration rolls, supports the assertion that communities of color fail to receive mail at rates higher than whites.[39] Similarly,

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37. Compared to the national rate of 79.3% and the rate for Whites of 82.5%, the mail return rates for other households by race are: Black (70.0%), Asian (75.4%), American Indian and Alaska Native (69.8%), Native Hawaiian and Other Pacific Islander (59.7%), Some Other Race (56.2%), Two or More Races (71.7%). Black householders made up 12.1% of all householders, but only 10.7% of mail returns, Asian householders made up 4.1% of all householders, but only 3.9 % of all mail returns, and Some Other Race householders made up 4.2% of all householders, but only 3.0 % of all mail returns. Earl Letourneau, U.S. Census Bureau, Mail Response/Return Rates Assessment (2012) at 23-24, https://www.census.gov/2010census/pdf/2010_Census_Mail_Response_Return_Rates_Assessment.pdf

38. Emily L. Mahoney, Hillary Davis, and Jimmy Miller, Ctr. for Public Integrity, *America Scrubs Millions from the Rolls. Is it Fair?* (Aug. 22, 2016), https://www.publicintegrity.org/2016/08/22/20079/america-scrubs-millions-voter-rolls-it-fair.

39. Robert Walters and Mark Curriden, *A Jury of One's Peers?: Investigating Underrepresentation in Jury Venires*, 43 Judges'

Black neighborhoods experience a higher percentage of undeliverable-as-addressed (UAA) jury summonses than White suburban areas.[40] Studies have also found that UAA summonses disproportionately affected households earning less than $35,000[41], and that mail delivery in general is less reliable in urban areas, like Ohio's largest cities, Cleveland, Cincinnati and Columbus, where people of color are more likely to live than whites.[42]

These studies show that the Supplemental Process, which requires voters to respond by mail to confirm their addresses in order to stay on the voter rolls, disproportionately results in the removal of voters of color.

III. OHIO IS NOT ALONE IN ITS VIOLATION OF THE NVRA

Ohio's unnecessary supplemental process has made it, as one State representative said "the number one purger of voters in the country."[43] But unfortunately, Ohio

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Journal 17, 19 (2004); Ted Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1815 (2001).

40. Peter S. Canellos, *In Prosecuting Federal Crime, Jury Pool can be an Issue of Race*, Boston Globe (Sept. 20, 2005), http://archive.boston.com/news/nation/washington/articles/2005/09/20/in_prosecuting_federal_crime_jury_pool_can_be_an_issue_of_race.

41. Eades, *Revisitng the Jury System in Texas*, at 1815.

42. John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 425 (1997), *citing United States v. Ortiz*, 897 F. Supp. 199, 204 (E.D. Pa. 1995).

43. Jackie Borchardt, *Ohio lawmaker wants the state to stop purging inactive voters*, Cleveland.com (Dec. 2, 2015), http://www.

is not the only State failing to comply with the NVRA. Ohio is only one of several States across the country that undertake the extra—and unlawful—supplemental process, which punishes its citizens for not voting.[44] States such as Oklahoma, Tennessee, Georgia, and Hawaii impermissibly use a voter's lack of participation to initiate the voter-removal process. Several of the NAACP's State and State-Area Conferences have initiated litigation to protect the rights of voters to remain on the rolls. Tennessee and Georgia have similar statutes.[45]

Georgia developed a *mandatory* secondary system of removing voters from its rolls for failure to vote, while permitting, but not requiring, the State to use the NVRA's voter-removal procedure that relies on Postal Service information. *Cf.* O.G.C.A. § 21-2-234(a) (mandatory unlawful voter-removal scheme); O.G.C.A. §21-2-233 (lawful, permissive voter-maintenance program). Deval Patrick, the then-Assistant Attorney General for Civil Rights, sent a letter to the State of Georgia in 1993 outlining

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cleveland.com/open/index.ssf/2015/12/ohio_lawmaker_wants_the_state.html

44. Notably, many of these states would have been covered under Section 5 of the Voting Rights Act of 1965, and they have high concentrations of African-Americans and other communities of color, impoverished persons, and students.

45. Georgia's unlawful procedure is described more fully below. Tennessee's procedure is codified at T.C.A. §2-2-106(c) (2010) ("The county election commission shall also follow [address verification] process if indications exist that the voter may no longer reside at the address at which the voter is registered, *such as the voter's failure to vote*, or otherwise update the voter's registration over a period of two (2) consecutive regular November elections.") (emphasis added). *See also Common Cause and Georgia NAACP v. Kemp*, No. 17-11315 (11th Cir. June 5, 2017).

the NVRA's prohibition of using a person's failure to vote as a starting process for voter roll maintenance. Georgia not only continued using it, but made it mandatory. Under this improper law, this mandatory purge process is triggered solely by an individual's failure to vote in previous elections. Even though Georgia is on notice that the NVRA specifically prohibits removal based on failure to vote, it continues to enforce the law. Through this impermissible process, Georgia removed over 370,000 voters from its rolls between 2012 and 2014.[46]

Similarly, pursuant to Hawaii Revised Statutes §11-17, if a person has not voted in the last two general, primary, or special elections, that person is removed from the rolls.[47] Hawaiians are not warned that they may be removed, and no confirmation notice is sent. The registrar simply strikes those persons from the rolls. Notably, the NVRA's prescribed method of cleaning voter rolls is the *secondary* plan used by Hawaii. As of 2014, Honolulu's election director alone removed 30,000 to 40,000 voters from the roll *each year* after an election.[48]

Upholding the Sixth Circuit's ruling would prevent States from enacting new legislation that violates the NVRA, and would create a uniform, nondiscriminatory method of maintaining voter rolls—as Congress intended.

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46. *See* U.S. Election Assistance Commission Report to the 114th Cong.: *The 2014 EAC Election Admin. and Voting Survey Comp. Rept.* 106 (June 30, 2015).

47. Hawaii Rev. Stat. §11-12 (2016).

48. Nathan Eagle, *Should Hawaii Purge More People from List of Registered Voters?* Civil Beat (Oct. 20, 2014), http://www.civilbeat.org/2014/10/should-hawaii-purge-more-people-from-list-of-registered-voters/.

CONCLUSION

Ohio's Supplemental Process is the most recent hurdle in a long road of barriers to voters of color voting in the State of Ohio. These impediments have disproportionately impacted the rights of voters of color and led to voter inactivity in communities of color. Pursuant to Ohio's Supplemental Process, these voters are vulnerable to being purged improperly from the registration rolls based solely on inactivity, which violates the letter and spirit of the NVRA. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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Kan. Stat. Ann. § 25-2354(a) 7

La. Stat. Ann. § 18:193 8

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W. Va. Code § 3-2- 4a(a)(4) 7

W. Va. Code § 3-2-25(d) 7

OTHER AUTHORITIES

About the National Voter Registration Act, U.S. Dep't of Justice, https://www.justice.gov/crt/about-national-voter-registration-act (last updated Aug. 8, 2015) 10

TABLE OF AUTHORITIES—Continued

Page(s)

The Constitution Project & Electionline.org, Election Reform Briefing: Working Together? State and Local Election Coordination (2002), https;//research.policyarchive.org/15106.pdf [https://perma.cc/G7BR-5RQB] 12

The Pew Center on the States, Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf [http://goo.gl/EZZ9J4] ... 12-13

The Pew Center on the States, The Real Cost of Voter Registration: An Oregon Case Study (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/the-real-cost-of-voter-registration-pdf.pdf 13

STATEMENT OF INTEREST[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[1] Because this case is before the Court for oral argument, the ten-day notice requirement for filing of an *amicus curiae* brief does not apply. Both Petitioner and Respondents have consented to the filing of *amicus curiae* briefs in this matter, and the Clerk has noted these blanket consents on the docket of this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

Amici represent elected and appointed state and local governments and government officials who are tasked with maintaining voter rolls and running elections. Amici submit this brief to assist the Court in

understanding the practical implications of the case before it. Regarding elections, state and local governments are tasked with encouraging voter participation while also maintaining accurate voter rolls. These dual goals—each significant enough to be addressed by both the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA)—demand flexibility for successful execution in the myriad of locales represented by amici.

While amici offer this brief in support of the Petitioner, their concerns go far beyond the issues raised in the instant appeal. Thus, amici offer this brief in support of the fundamental proposition that, given the varying resources, responsibilities, and challenges of state and local governments, whatever decision this Court makes should recognize the need for clarity of the law in this area and for allowing flexible, individual approaches within the bounds of that law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Registering voters and maintaining voter rolls have historically been actions taken by state and local governments. Thus, state and local governments have been the "laboratories of democracy" when it comes to these often competing goals. Were the only goal of voter registration to have as many registered voters as possible, there would be little incentive to remove registered voters from voter rolls, or to require registration at all. Similarly, were the only goal to maintain accurate voter rolls, voter registration that carries over from one election to another would likely bow to a system of registration for each election coupled with stringent voter identification requirements. State and local governments have worked diligently to strike a

balance that preserves voter rights by ensuring access to the voting process while at the same time preserving the integrity of elections by ensuring the accuracy of voter rolls.

Amici offer this brief to provide a pragmatic context to the decision the Court will make on the issues presented. Regardless of the Court's ultimate decision, amici ask the Court to keep in mind that it is hundreds, if not thousands, of individualized state and local governments who are tasked with implementing the legal requirements for voter registration and maintenance of voter rolls. Because these state and local governments already vary in their approaches, and will always vary in their resources, their constituencies, and their challenges, amici ask the Court to provide two things: 1) clear direction to guide state and local governments in the creation and any necessary revision of future and existing plans addressing voter registration and voter roll maintenance; and 2) flexibility to address these issues when creating and maintaining their programs. The need for such guidance is underscored by the presence of opposing constituencies who tend to bring suits against state and local governments regardless of the plans put forth.

ARGUMENT

I. THIS COURT SHOULD BE MINDFUL OF THE PRAGMATIC ISSUES FACED BY STATE AND LOCAL GOVERNMENTS IN CARRYING OUT THEIR ROLES IN THE ELECTION PROCESS.

A. Federalism and State and Local Governments' Involvement in the Election Process

When drafting the Constitution "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). Thus, the concept of federalism was born. As noted by this court, "[f]ederalism has more than one dynamic." *Id.* "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (quotation omitted).

To achieve these goals, the Constitution provides that all powers not specifically granted to the federal government are reserved to the states or citizens. U.S. Const. amend. X. Moreover, particularly with regards to elections, Article I, § 4 (the Election Clause), gives states primary responsibility for regulating the "Times, Places and Manner of holding Elections." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2265, 186 L. Ed. 2d 239 (2013). Thus, it is the states' duty to regulate the election process, even

those involving federal elections. "By reserving to the States default responsibility for administering federal elections, the Elections Clause protects several critical values . . . ." *Id.* at 2272 (Alito, J., dissenting). First, "it was found necessary to leave the regulation of federal elections, in the first place, to the state governments, as being best acquainted with the situation of the people." *Id.* (internal quotations and citation omitted). Second, "[b]y giving States a role in the administration of federal elections, the Elections Clause reflects the States' interest in the selection of the individuals on whom they must rely to represent their interests in the National Legislature." *Id.* Third, allocating the responsibility of regulating *federal* elections to the states also protects state rights to regulate *state and local* elections. "As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections." *Id.* Thus, the duty of the states to manage elections is a longstanding duty, and the value inherent in delegating this duty to the states is evident.

It is equally evident that with each state managing its own election systems, no single method of election management exists. While this high degree of involvement by each separate state in the election process might lead one to believe that we operate under fifty different electoral systems, the fact that many states grant local governments a significant role in election management means that, in reality, we operate under *hundreds, if not thousands,* of different electoral systems. By way of example only, a few of the differing

systems used by states to operate and maintain their voter registrations and voter rolls follow:

- Kansas calls for the chief state election official or county officer to check the registration records of voters against the National Change of Address files once each calendar year. Kan. Stat. Ann. § 25-2354(a).
- West Virginia, as part of its process for removing ineligible voters from the active registration list, compares the records of all of its voters not identified as registered to vote in another county in the State with National Change of Address files. W. Va. Code § 3-2-25(d). West Virginia also requires its statewide database to be coordinated with other agency databases within the state. § 3-2-4a(a)(4).
- Virginia requires that on or before October 1 of each year, the Department of Elections conduct a match of the Virginia registered voter lists with the list of deceased persons maintained by the Social Security Administration. Va. Code Ann. § 24.2-404.3. Likewise, Virginia keeps a permanent, separate list of those who were removed from voter rolls due to death or a felony conviction and a list of all removed voters, along with the reason for their removal, for four years. § 24.2-404.
- Nevada requires its Department of Motor Vehicles to verify the accuracy of information in a voter registration application with the Social Security Administration. Nev. Rev. Stat. § 293.675.
- Rhode Island requires its Secretary of State to receive a monthly list of names of deceased

people from the state's office of vital statistics. R.I. Gen. Laws § 17-10-1(c).

- Ohio requires state agencies, including the Department of Health, Bureau of Motor Vehicles, Department of Job and Family Services, and the Department of Rehabilitation and Corrections to provide data to its Secretary of State to maintain the statewide voter registration database. Ohio Rev. Code Ann. § 3503.15(A)(2)(a).
- When a registrar in Louisiana receives word that a voter is ineligible or has moved, the voter is first moved to the inactive list while the registrar confirms the voter's status. If a voter is on the inactive list for two general election cycles, his voter record is cancelled. La. Stat. Ann. § 18:193.
- In North Carolina, county boards of election administer the voter registration process. N.C. Gen. Stat. § 163-82.1(b). While North Carolina itself maintains a centralized registration list, each county board also provides list maintenance. *See* N.C. Gen. Stat. § 163-82.11; *see also* Mo. Rev. Stat. §§ 115.141, .158 (placing local election authorities in charge of voter registration and giving state and local election authorities shared responsibility for maintaining statewide voter list).

And this is just as it should be. By operating under different systems and trying different methodologies, state and local governments are, in fact, operating as the "laboratories of democracy." This is a role state and local governments guard jealously both because of the important part it plays in our democracy, and because of the obligations state and local governments have

to the individual voters within their jurisdictions. But the importance of this role for state and local governments is commensurate with its difficulty. In attempting to succeed, state and local governments face a dizzying number of challenges, including increasingly confusing and conflicting opposition to their efforts to comply with the legislation at issue in the instant case.

B. Conflicting Constituencies

As noted in the filings of the parties, two federal statutes, the NVRA and HAVA, are at issue in this matter. Specifically, the two parties dispute whether these statutes allow the use of the Ohio Supplemental Process as a means for maintaining the accuracy of voter rolls.

The NVRA, 52 U.S.C. §§ 20501–20511, is designed to protect the integrity of the electoral process and ensure that states maintain accurate and current voter registration lists for federal elections. It balances the need to ensure fair access to voter registration with the need to maintain accurate voter registration lists for the purpose of promoting election integrity.

The NVRA mandates that states maintain accurate voter rolls, requiring each state to "conduct a general program that makes reasonable effort to remove" from its voter-registration rolls the names of persons who may have moved or passed away. § 20507(a)(4). To promote the goal of increased voter participation, the NVRA also prohibits states from:

(1) removing a person's name "by reason of the person's failure to vote." § 20507(b)(2).

(2) removing a person's name on the ground that the person has moved

(a) unless the person fails to respond to an address-confirmation notice and

(b) fails to vote in the next two consecutive general elections for federal office. § 20507(d)(1)(B) (added to the NVRA by the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, § 903, 116 Stat. 1666, 1728).

Beyond these general outlines, however, the NVRA largely leaves to the states how best to effectuate its purposes.

The NVRA became effective in most states on January 1, 1995, and applies to 44 states and the District of Columbia. The Act provides that states were exempt from the Act if, as of August 1, 1994, they had no voter registration requirements or had election-day registration at polling places. § 20503(b). The six states exempt from the NVRA under this provision are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. *About the National Voter Registration Act*, U.S. Dep't of Justice, https://www.justice.gov/crt/about-national-voter-registration-act (last updated Aug. 8, 2015).

Although states ultimately retain liability for NVRA compliance, case law establishes that where state law delegates certain NVRA responsibilities to Local Election Agencies (LEAs), local governments also are liable for compliance. *See True the Vote v. Hosemann*, 43 F Supp. 3d 693, 712 (S.D. Miss. 2014) ("Other courts confronted with NVRA lawsuits have likewise recognized that Counties or County officials were proper parties to the suit. . . ."); *see also Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (defendant sued in her official capacity as General Registrar of

Norfolk). Thus, both state and local governments have an interest in issues impacting NVRA compliance.

In 2002, Congress passed HAVA, which, in part, required states to establish computerized statewide voter databases, and required that such databases be maintained consistent with the provisions of the NVRA. 52 U.S.C. § 21083. Taken together, it is fair to say that the NVRA and HAVA seek to achieve two primary objectives:

(1) to establish procedures to increase the number of eligible citizens who register to vote in federal elections; and

(2) to protect the integrity of the electoral process by ensuring maintenance of accurate and current voter registration rolls.

While each of these goals is laudable, in their attempts to achieve both, state and local governments can become caught between the proverbial rock and hard place.

Nowhere is this tension more apparent than in the legal actions faced by state and local governments, brought by competing constituencies who often favor one goal over the other, or who have differing opinions on how these statutes should be applied. For example, in the current matter, the State of Ohio faces an action by parties who seek to invalidate a chosen methodology for voter roll maintenance based upon the assertion that the process endangers the rights of certain voters. But state and local governments also consistently face legal actions by parties unsatisfied with current voter registration maintenance, who often seek enforcement through the entry of consent decrees requiring state and local governments to take specific actions to remove ineligible and potentially

ineligible voters from the voter registration rolls. *See, e.g.*, *Am. Civil Rights Union v. McDonald*, No. 2:14-cv-12 (W.D. Tex. 2014); *Am. Civil Rights Union v. Jefferson Davis Cty.*, No. 2:13-cv-87 (S.D. Miss. 2013).

In summary, amici note the undeniable existence of two (or more) distinct and very active constituencies, each seeking to hold state and local governments accountable for compliance with the NVRA and HAVA. Each constituency pushes state and local governments to create and adopt programs to achieve the goals of the NVRA and HAVA (as viewed by that constituency), and each shows no hesitancy in bringing legal action when it perceives that program implementation is at odds with its own, specific goals.

C. Impact on State and local governments

Not surprisingly, when state and local governments are called upon to engage in this delicate balancing act, the consequences are distinctly felt by these entities in terms of expense and utilization of resources. It is common for local governments to cover the costs of running elections or at the very least engage in cost sharing with the state. These duties often including voter list maintenance. *See generally* The Constitution Project & Electionline.org, Election Reform Briefing: Working Together? State and Local Election Coordination (2002), https://research.policyarchive.org/15106.pdf [https://perma.cc/G7BR-5RQB]. While numbers vary between localities, costs for printing and processing forms, handling returned mail from inaccurate records, and maintaining registration databases add millions of dollars to state and local budgets that often are already strained. *See* The Pew Ctr. on the States, Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System

Needs an Upgrade 5 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf [http://goo.gl/EZZ9J4].

In fact, one case study examining 2008 voter data in Oregon established that the average cost of voter registration and voter roll maintenance in that year was $4.11 per registered Oregon voter. *See* The Pew Center on the States, The Real Cost of Voter Registration: An Oregon Case Study 1 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/the-real-cost-of-voter-registration-pdf.pdf. If the cost was divided only among those initially registering and those making some change to their voter registration, the cost per transaction was $7.67. *Id.* At first blush, these costs may seem insignificant. But there are currently in excess of 200,000,000 registered voters in the United States. Using the numbers for Oregon as representative, the annualized national cost of voter registration and voter roll maintenance would be upwards of $800,000,000 based on limited 2008 cost data.

However, these hard dollar costs for registering voters, running elections, and maintaining voter databases are only the beginning. When competing constituencies bring legal actions, state and local governments have the additional costs associated with litigation, including, but not limited to, attorneys' fees for adequate representation. In addition, the internal costs for maintaining the electoral system (such as worked hours, purchasing and maintaining adequate resources to perform necessary functions, etc.), place a strain on already overburdened state and local government budgets. And to the extent state and local governments are forced to constantly rework voter registration and maintenance procedures as a result

of such challenges, each additional iteration adds to that burden.

None of which is to say that state and local governments wish to avoid the vital role they play in our country's electoral system. Nothing could be further from the truth. Management and maintenance of the electoral system *should* be maintained at a level of government that is accessible and answerable to the voters of a particular state. Ultimately, however, the mandates of federal legislation such as the NVRA and HAVA become financial burdens on state and local governments, making clear guidance on compliance issues paramount. The better state and local governments understand the legal requirements under which they operate, the more efficiently they can carry out those duties.

D. Amici's Goal

Against this contextual backdrop of the complexity in which state and local governments operate, the need for substantive guidance in the legal standards to be applied under federal regulations affecting voter registration and voter roll maintenance becomes clear. State and local governments need certainty as to what the law is so they can proceed with carrying out the twin goals of the NVRA and HAVA within the bounds of that law.

As important, given the wide variance of procedures employed by different state and local governments to comply with the law, is this Court's recognition that there is no "one size fits all" answer. State and local governments should understand the clear dictates of the law, but also should be given flexibility within the limits of that law to employ the tactics that work best for particular states or local governments. To be more

specific, it seems apparent that simply relying upon the National Change of Address database, helpful though it is, is not enough. More needs to be done to ensure the integrity of voter rolls. The real question, then, is, "What is that something more?"

Considering the instant case as an example provides some understanding of what amici are seeking on behalf of their members. Petitioner argues that the Ohio Supplemental Process is a valid process by which to maintain voter rolls because it is the voter's failure to return a response card that initiates that voter's ultimate removal from the voter rolls. Respondents argue that because the sending of the response card itself keys off of a voter's failure to vote within a certain time, the voter's history impermissibly instigates the voter's removal from the voter roll. Even if the Court rules against Petitioner in this case, amici ask for guidance from the Court of the following nature:

- Can voter history ever be used in any way to assess the integrity of voter rolls?
- If so, how and to what degree may that history be used?
- If voter history may be used to any degree, what are adequate safeguards to prevent violation of voters' rights?

Amici recognize, acknowledge, and embrace that one process will not be the answer for every state or local government. Different state and local governments have different resources available. Some are more sensitive to allegations of voter fraud than others. But receiving the clearest guidance possible from the Court will allow state and local governments to employ

the needed flexibility while staying within the bounds of the law.

CONCLUSION

If the Court rules against Petitioner, amici are not asking the Court for an advisory opinion. But the reality is that many questions obviously abound regarding the application of the federal mandates captured within the NVRA and HAVA. Amici ask only that the Court provide as much clear guidance as possible within the parameters of the issues presented by this case to allow state and local governments to effectuate the goals of governing legislation, both in their creation and implementation of voter roll maintenance programs, and in their dealing with legal actions by constituencies that may continue to challenge such programs.

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IN THE
Supreme Court of the United States

JOHN HUSTED, OHIO SECRETARY OF STATE,
Petitioner,
v.
A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS OHIO, AARP, AFL-CIO, SEIU, DEMOCRACY INITIATIVE, NATIONAL COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND MIAMI VALLEY VOTER PROTECTION COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

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Anderson v. Celebrezze, 460 U.S. 780 (1983)	33, 36
Applewhite v. Commonwealth, No. 330 MD 2012 (Commw. Ct. Pa. Oct. 2, 2012)	25
Arizona v. Inter-Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013)	3
Clark v. Martinez, 543 U.S. 371 (2005)	32, 33
Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014)	15
Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)	29
League of Women Voters v. Newby, 838 F.3d 1 (D.C. Cir. 2016)	35
Mooneyhan v. Husted, Case No. 3:12-cv-379 (S.D. Ohio Nov. 16, 2012) (Decision and Entry Sustaining Plaintiff's Motion for a TRO)	2
NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014)	14, 17
N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C. 2016)	12, 25
Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012)	5
One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016)	15
Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984)	29

TABLE OF AUTHORITIES—Continued

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Ray v. Franklin Cnty. Bd. of Elections, Case No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008) (Opinion and Order Granting Plaintiff's Motion for TRO) 2

Reynolds v. Sims, 377 U.S. 533 (1964) 33

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 11

Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) 4, 15

Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) 17

STATUTES, REGULATIONS, AND LEGISLATIVE HISTORY:

42 U.S.C. § 15041 et seq. 2

52 U.S.C. § 20501 33

H.R. Rep. No. 103-9 (1993) 8, 28, 34

S. Rep. No. 103-6 (1993) 28

OTHER AUTHORITIES:

AARP Pub. Pol'y Inst., How the Travel Patterns of Older Adults are Changing (2011) 24

ACLU, Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities (2015) 36

TABLE OF AUTHORITIES—Continued

Page

AFL-CIO, Know Your Rights: State Laws on Employee Time Off to Vote (2016) 11

Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016 27

Anthony Downs, An Economic Theory of Democracy (1957) 19

Anuj Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 Sci. 682 (2012) 31

Ari Berman, Ohio GOP Resurrects Voter Suppression Efforts, The Nation, Dec. 4, 2013 16

Benjamin Highton, *Early Registration and Voter Turnout*, 59 J. Pol. 565 (1997) 17

Brennan Ctr. for Justice, Citizens Without Proof: A Survey of American's Possession of Documentary Proof of Citizenship and Photo Identification (2006) 24

Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2017) 10

Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in May 2004 (2005) 10

TABLE OF AUTHORITIES—Continued

Page

CalTech/MIT Voting Tech. Project, Voting: What Has Changed, What Hasn't, & What Needs Improvement (2012) 33

Charles Stewart III & Stephen Ansolabehere, *Waiting to Vote*, 14 Election L.J. 47 (2013) 17

Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 Soc. Sci. Q. 171 (2001) 35

Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote*, The Atlantic, Jan. 10, 2014..... 18

David A. Graham, *Ohio's 'Golden Week' of Early Voting Is Dead, Again*, The Atlantic, Aug. 23, 2016 10

Econ. Pol'y Inst., Irregular Work Scheduling and Its Consequences (2015) 10

Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 1 (2011)..... 11

John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246 (1993)..... 19

John E. McNulty, Conor M. Dowling & Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 Pol. Analysis 435 (2009) 12

TABLE OF AUTHORITIES—Continued

Page

Joseph Schachter & Sam Shapiro, *Birth Registration Completeness, U.S., 1950*, 67 Pub. Health Reps. 513 (1952) 26

Lawyers' Comm. for Civil Rights Under Law, 2010 Election Protection Report (2010) 34

Lawyers' Comm. for Civil Rights Under Law, 2014 Election Protection Report (2015) 34

Leadership Conference Educ. Fund, The Great Poll Closure (2016) 11

Lisa Schur & Douglas Kruse, Projecting the Number of Eligible Voters with Disabilities in the Nov. 2016 Elections (2016) 21

Lisa Schur, Meera Adya & Douglas Kruse, Research Alliance for Accessible Voting, Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections (2013).... 20, 22

Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 Am. Pol. Q. 74 (1994)..... 35

Mark Jones, Renée Cross & Jim Granato, Univ. of Houston, Hobby School of Pub. Affairs, The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District (2017)..... 16

M.E. Kropf, *Does Early Voting Change the Socio-Economic Composition of the Electorate?*, 4 Poverty & Pub. Pol'y 1 (2012) 19

TABLE OF AUTHORITIES—Continued

Page

Monica Anderson, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Ctr., Mar. 22, 2017 12

Nat'l Ctr. For Educ. Statistics, Assessment of Adult Literacy, A First Look at the Literacy of America's Adults in the 21st Century (2006) 30

Nat'l Educ. Ass'n, Understanding the Gaps: Who Are We Leaving Behind—And How Far (2015) 30

Nat'l Coalition for the Homeless, You Don't Need a Home to Vote," Voting Rights: Registration Manual (2016) 29

Nat'l Conference of State Legislatures, Voter Identification Requirements (2017) 15

New State Voting Laws III: Protecting the Right to Vote in America's Heartland: Hearing Before Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm., 112th Cong. 7 (2012) (Testimony of Carrie L. Davis, Exec. Dir., League of Women Voters of Ohio) 14

Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NPR, July 23, 2015, 3:38 PM 26

TABLE OF AUTHORITIES—Continued

Page

Raymond E. Wolfinger, Benjamin Highton & Megan Mullin, *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 St. Pol. & Pol'y Q. 1 (2005) 17

Ruth Igielnik, *A Political Profile of Disabled Americans*, Pew Research Ctr., Sept. 22, 2016 ..... 22, 23

Sam Shapiro, *Development of Birth Registration and Birth Statistics in the U.S.*, 4 Population Stud. 86 (1950) 25, 26

Stephen Knack, *Election Day Registration: The Second Wave*, 20 Am. Pol. Q. 65 (2001) 35

Stephen Pettigrew, *The Race Gap in Wait Times: Why Minority Precincts are Underserved by Local Election Officials*, 132 Pol. Sci. Q. 527 (forthcoming 2017) 16, 17

Thad E. Hall & R. Michael Alvarez, Information Tech. & Innovation Found., Defining the Barrier to Political Participation for Individuals with Disabilities (2012) 22

Transportation for America, Aging in Place: Stuck Without Options (2011) 24

U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates 12, 13, 19, 23

U.S. Census Bureau, Electorate Profiles: Selected Characteristics of the Citizen, Voting-Age Population (2016) 19

TABLE OF AUTHORITIES—Continued

Page

U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members, by Age and Family Income: Nov. 2016 (2017) 18

U.S. Census Bureau, Table 10. Reasons For Not Voting, By Selected Characteristics: November 2016 (2017) 13

U.S. Census Bureau, The Supplemental Poverty Measure: 2016 (2017) 26

U.S. Gov't Accountability Office, Observations on Wait Times for Voters on Election Day (2012) 17

U.S. Gov't Accountability Office, Voters with Disabilities: Challenges to Voting Accessibility (2013) 21

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations whose constituents, members, and clients face significant obstacles to voting. While voting is an easy and routine part of civic participation for some Americans, for many other eligible voters—including people with disabilities, older voters, working people, low-income voters, and the homeless—this is not the case. Because these voters face disparate obstacles to voting, they (or subgroups of them) do not vote as regularly and therefore are disproportionately harmed by the use of failure to vote as a reason for removal from the voter registration rolls. *Amici* represent these communities and therefore can best present to the Court the particular obstacles many such voters face each time they seek to cast a ballot.

Amicus curiae the National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The United States Congress established P&A and CAP agencies to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Amicus curiae Disability Rights Ohio is a nonprofit organization designated by the Ohio Governor as the protection and advocacy (P&A) system under federal law for people with disabilities in Ohio, *see* 42 U.S.C. § 15041 et seq. The mission of Disability Rights Ohio is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. As the P&A system for Ohio, Disability Rights Ohio engages in a wide range of advocacy to enforce the rights of people with disabilities, including removing barriers to participation in society. The right to vote is fundamental, and Disability Rights Ohio has a long history of working with people with disabilities to remove voting access barriers and enforcing their rights to participate in Ohio's electoral process. *See e.g.*, *Mooneyhan v. Husted*, Case No. 3:12-cv-379 (S.D. Ohio Nov. 16, 2012) (Decision and Entry Sustaining Plaintiff's Motion for a TRO) (enforcing the ADA rights of a person with mental illness hospitalized on election day to vote); *Ray v. Franklin Cnty. Bd. of Elections*, Case No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008) (Opinion and Order Granting Plaintiff's Motion for TRO) (enforcing the ADA rights of a

person with mobility impairments to access a post-election ballot correction process to ensure her ballot was counted).

Amicus curiae AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. AARP and AARP Foundation are committed to encouraging voter registration and electoral participation and to reducing impediments thereto, such as rules triggering the purging of voters from registration lists based on their decision not to vote. AARP and AARP Foundation also support state procedures to prevent and detect voter fraud, but only means proportional to actual evidence of actual or attempted fraud. *Amici* are concerned that Ohio's Supplemental Process imposes excessive burdens on older voters, especially disabled, minority, low-income, and other vulnerable older voters, who have lived at and voted based on the same address for many years.

AARP has previously filed or joined amicus briefs challenging state laws restricting electoral participation in this Court, *see e.g.*, *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), and

in multiple federal and state appellate courts, *see, e.g.*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

Amicus curiae the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor unions that represent 12.5 million working men and women. Throughout its history, the AFL-CIO and its affiliated unions have encouraged union members and their families to engage in elections with the goal of electing representatives supportive of the interests of working families. As a result of these efforts, union households participate in elections in proportionately greater numbers than the general public. Even so, working people face multiple barriers to voting. The AFL-CIO and its affiliated unions have strived to reduce these barriers, and we have advocated to expand voter registration, education, and turn-out across the country. While many working people benefit from collective bargaining agreements that afford them time off to vote on Election Day without the fear of negative employment or economic consequence, not all collective bargaining agreements contain these protections, and many workers without collective bargaining agreements have no such protection. Given the obstacles to voting, the AFL-CIO believes states should not be permitted to compound these obstacles by removing people from the registration rolls solely based on the failure to vote.

Amicus Curiae Service Employees International Union (SEIU) is a labor union of two million men and women who work in healthcare, property service, and public service employment in the United States, Canada, and Puerto Rico. Many SEIU members live,

work, and vote in Ohio. SEIU engages in voter protection, education, and other election-related activities around the country, and SEIU and its locals have participated many times in election-related litigation as parties and as amici. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (SEIU locals as plaintiffs).

Amicus curiae the Democracy Initiative is a dynamic coalition of 60 diverse labor, environmental, civil rights, and good government groups building a demand for a reflective democracy by mobilizing 30 million members nationwide. The partner organizations and members work on a diverse range of progressive causes but each are committed to improving and protecting our democracy. As part of its mission, Democracy Initiative advocates for a democracy where all eligible voters are on the rolls, all voters can participate freely and fairly, and all votes are counted as cast in a modern and secure election system.

Amicus curiae the National Coalition for the Homeless is a national network of people who are currently experiencing or who have experienced homelessness, activists and advocates, community-based and faith-based service providers, and others committed to a single mission: To prevent and end homelessness while ensuring the immediate needs of those experiencing homelessness are met and their civil rights protected. Since 1992, the Coalition has been working to ensure that homeless and low-income voters have full and equitable access to voting mechanisms in their communities.

Amicus curiae the Columbus Coalition for the Homeless works to empower homeless persons to

achieve greater self-sufficiency and advocates on behalf of homeless persons and organizations that serve them. Founded in 1986 by a group of Columbus service providers, it helps member organizations provide direct services to the homeless and advocates to the government on their behalf. The Coalition is steadfastly committed to assuring the homeless maintain their voting rights both legally and practically.

Amicus curiae the Miami Valley Voter Protection Coalition is a non-partisan organization established in 2008. It includes individuals, community organizations, and civil rights and good government groups from Montgomery, Greene, and Clark counties in Ohio. It works to ensure that everyone who is eligible to vote is able to vote and that all those votes are counted. Members have testified on voting related legislation at the Ohio Statehouse. The Coalition works with Boards of Elections to ensure that their policies and procedures facilitate voting. Every two years, it recruits and trains volunteers who are available outside polling places on Election Day to advise voters of their rights, answer questions, and help solve problems.

SUMMARY OF ARGUMENT

This case presents the question of whether the National Voter Registration Act (NVRA) allows states to initiate the process for removing citizens from the registration rolls based solely on their failure to vote. Allowing states to disenfranchise voters on this basis would be contrary to the NVRA's general purpose of broadening participation of the electorate and the Act's specific goal of expanding access for historically disenfranchised groups. It would also unneces-

sarily and unjustifiably tread on the fundamental right to vote of many Americans already facing significant obstacles to political participation.

While for some Americans voting is an easy and routine part of civic participation, for large sectors of the American electorate—including people with disabilities, older persons, working and low-income people, and the homeless—this is not the case. Limited voting hours, erratic job schedules, child care needs, the closing of neighborhood polling places, inadequate or inaccessible transportation, and the costs associated with obtaining a photo identification, to name a few obstacles, mean that many eligible voters are unable to cast ballots on Election Day—despite registering where necessary, being motivated to vote in the particular election, and in some cases, even arriving at the correct polling place and waiting in line. Additionally, voters with disabilities—who also disproportionately experience poverty and its attendant obstacles to voting—face an election system in which less than one third of polling places are fully accessible. Finally, older voters, who are disproportionately represented among voters with disabilities, often face formidable barriers to voting and will face even greater barriers if they are struck from the rolls despite years living in the same place, sometimes for decades.

Because of these barriers, voters with disabilities and low-income voters vote at lower rates than the rest of the public, and working people and older voters participate at rates lower than they would absent those barriers. As a result, the harm of Ohio's challenged removal procedure (the "Supplemental Pro-

cess") falls disproportionately on those citizens for whom various features of the voting process already present significant obstacles to participation.

Amici—organizations comprised of and advocating for people with disabilities, older voters, working people, and low-income and homeless voters—submit this brief to present to the Court the severity, breadth, and impact of these obstacles on eligible voters. *Amici* submit that the overlapping barriers to voting noted above and described in greater detail below demonstrably affect the voting patterns of large sectors of the electorate.

The underlying assumption of the "Supplemental Process"—that a voter who has not voted in two years has likely moved—is fundamentally flawed. Nonvoting can often be explained by the remaining barriers to political participation for historically disenfranchised voters. By removing eligible voters facing these difficulties from the registration rolls, Ohio's process compounds these obstacles and imposes unnecessary burdens on access to the franchise.

Congress passed the NVRA with the express purpose of expanding participation of the electorate and the specific goal of lowering barriers to voting for historically disenfranchised groups. In passing the NVRA, Congress recognized that there are "many factors involved in the lack of public participation," some of which are "largely beyond the control of Congress" and that it could not, in one sweep, remove all of those barriers. H.R. Rep. No. 103-9, at 3 (1993). Yet, in an area under its control, "the difficulties encountered by eligible citizens in becoming reg-

istered to vote," it sought to reduce those obstacles to "the absolute minimum." *Id.*

A key element of the NVRA's scheme to lower registration barriers is its sections that seek to ensure that "a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." *Id.* at 18. By keeping eligible voters on the registration lists—even when they have not voted—the NVRA eliminates a major barrier to future political participation and "give[s] the greatest number of people an opportunity to participate." *Id.* at 3. Any other reading of the NVRA's list maintenance provisions would be at odds with its purposes and create constitutional concerns by erecting unnecessary and unjustified barriers to the exercise of the right to vote.

ARGUMENT

I. MANY VOTERS FACE SUBSTANTIAL OBSTACLES TO THE BALLOT BOX.

a. Working people and low-income voters navigate substantial obstacles to the ballot box.

For many Americans, exercising their right to vote requires overcoming a series of obstacles. Working people, and particularly low-wage workers, regularly navigate the confines of irregular work schedules, childcare needs, and unreliable transportation. However, these daily challenges can be cumulative and, within the limited hours available to vote on Election Day, can add up to prevent even the most motivated voter from casting a ballot.

First, working people and low-income voters must find a time to get to the polls outside of their work schedules.[2] However, low-wage workers are less likely to have flexible work schedules that allow them to vary their hours.[3] Indeed, many low-wage workers not only do not have flexibility to set their hours but also have unstable and/or on-call work schedules that make it difficult or impossible to plan other activities ahead.[4] Many voters also need to coordinate a time to vote that works not only with their work schedule but with their childcare schedule. Others—nearly seven million people across the country—work at two or more different jobs,[5] further exacerbating the obstacles to voting that employment and childcare schedules can create.

A voter who is unable to go to the polls outside of her working hours may be required to forgo pay in

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[2] Ohio recently rolled back its early voting days and hours, eliminating a full week of early voting. David A. Graham, *Ohio's 'Golden Week' of Early Voting Is Dead, Again*, The Atlantic, Aug. 23, 2016, https://www.theatlantic.com/politics/archive/2016/08/ohio-voting-decision/497066/.

[3] Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in May 2004 (2005), https://www.bls.gov/news.release/pdf/flex.pdf.

[4] Econ. Pol'y Inst., Irregular Work Scheduling and Its Consequences 1 (2015), http://www.epi.org/files/pdf/82524.pdf (noting GSS survey data that 10% of the workforce has an irregular schedule and that lower income workers are more likely to have irregular work schedules).

[5] The Bureau of Labor Statistics reports that approximately 5% of workers in 2016 held more than one job. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2017), https://www.bls.gov/cps/cpsaat36.htm.

order to cast her ballot. Although some workers have voting leave protected by state law or collective bargaining agreements, many others do not, and federal law affords no such protection.[6]

Next, voters must locate their polling locations. Although some voters head to the same polling place year after year, many live in jurisdictions where there is less predictability—especially in the wake of this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In a study of 381 counties formerly covered by Section 5 of the Voting Rights Act, researchers found 868 polling place closures between 2012 and 2016.[7]

Studies have shown that changes in polling locations can have a statistically significant impact on turnout and attribute more than half of that impact to the informational cost of discovering the change and finding the new location in time to vote.[8] For homeless voters or voters without literacy skills or ready access to technology,[9] finding a changed poll-

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[6] *See* AFL-CIO, Know Your Rights: State Laws on Employee Time Off to Vote (2016), https://aflcio.org/2016/11/5/know-your-rights-state-laws-employee-time-vote.

[7] Leadership Conference Educ. Fund, The Great Poll Closure 4 (2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf.

[8] *See* Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 1, 15 (2011).

[9] While the internet is an increasingly critical source of information in modern daily lives, there remains a significant digital divide in our country. Nearly half of households with

ing location can be particularly difficult.[10] Polling place changes significantly affect turnout even when the electorate is particularly motivated to vote.[11]

Once voters know where to go, they must find transportation to their polling place. Lack of access to reliable transportation disproportionately affects low-income Americans across many aspects of their lives and voting is no different. According to the American Community Survey, 9.1 percent of households have no vehicle available and over one third of households have only one vehicle for the entire

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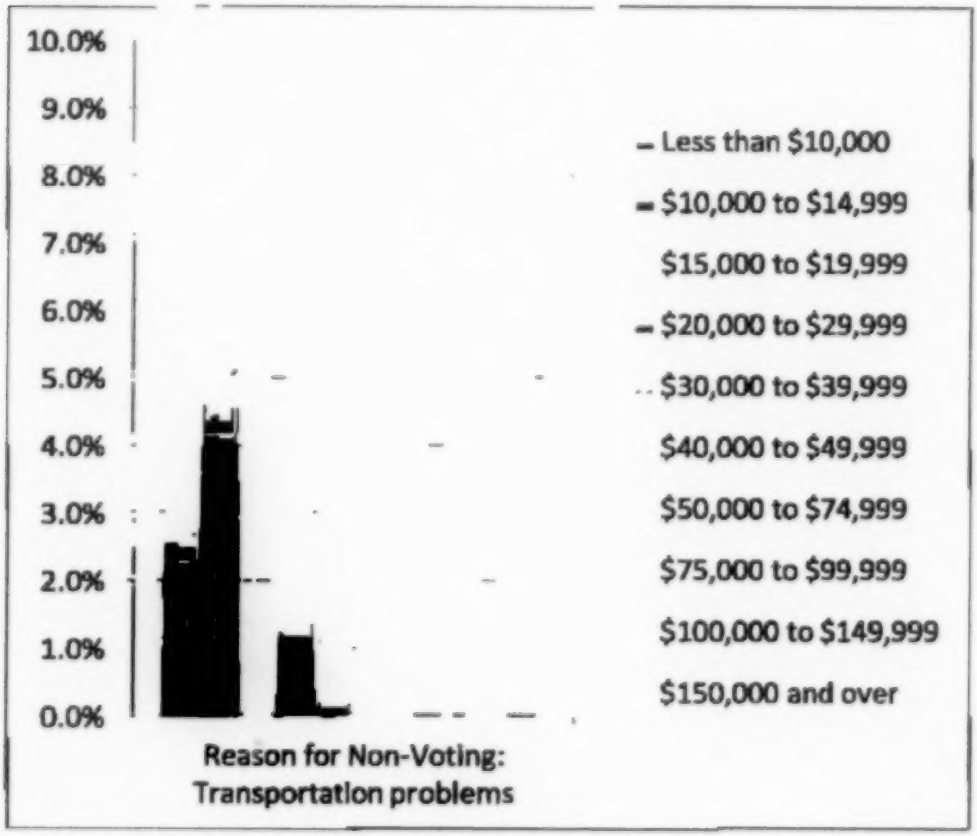
incomes under $30,000 do not have home internet service while 94% of households with incomes over $100,000 are connected. Approximately one third of households with incomes under $30,000 have no access to the internet. *See* Monica Anderson, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Ctr., Mar. 22, 2017, http://www.pewresearch.org/fact-tank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

[10] *See generally* Expert Report of Barry C. Burden 12 (Feb. 12, 2015), *N.C. State Conference of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016) (No. 1:13-cv-658), *available at* https://cdn.theatlantic.com/assets/media/files/41187c5df0d29acea8_q1m6bhevg.pdf ("Numerous studies have shown that educational attainment is often the single best predictor of whether an individual votes. This is largely because education lowers the 'costs' of voting by providing language skills, direct information about the electoral process, and a sense of confidence of efficacy that facilitate participation even when the rules are changed.").

[11] *See* John E. McNulty, Conor M. Dowling & Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 Pol. Analysis 435 (2009).

household.[12] In the Census Bureau's 2016 voting and registration survey, approximately eight percent of registered citizens earning less than $15,000 per year who did not vote cited transportation problems as the reason for not casting a ballot. Yet, transportation problems accounted for less than one percent of registered non-voters earning more than $40,000.[13]

Figure 1.[14]



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[12] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Selected Housing Characteristics, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_SPT/DP04/0100000US.

[13] U.S. Census Bureau, Table 10. Reasons For Not Voting, By Selected Characteristics: November 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table10.xls

[14] *Id.*

These obstacles are, by their nature, cumulative and interdependent. For example, Ohio has early voting that might relieve some scheduling difficulties but each county only has one early voting center, posing greater transportation problems as voters have more distance to travel.[15]

Similarly, cutbacks to polling locations can affect not only voters' ability to find their polling place but also their ability to get transportation to those locations and the lines once they get there. After 2008, many Ohio counties consolidated precincts and polling places. Between 2008 and 2010, fourteen Ohio counties, including some of its most populous, reduced their precincts by more than fifteen percent.[16] As a result, for many Ohioans, what used to be a short walk to their polling place now requires a drive to a polling location that serves many more voters.

Assuming the ability to get to their polling location during voting hours, voters may face additional hurdles that require both time and financial resources to overcome. In some states, they must determine

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[15] Expert Report of Vincent J. Roscigno, Racial Inequality, Racial Politics and the Implications of Recent Voting Restrictions in Ohio 18 (June 30, 2014), *NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (No. 2:14-cv-404), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio193.pdf.

[16] *New State Voting Laws III: Protecting the Right to Vote in America's Heartland: Hearing Before Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 112th Cong. 7 (2012) (Testimony of Carrie L. Davis, Exec. Dir., League of Women Voters of Ohio), https://www.judiciary.senate.gov/imo/media/doc/12-5-7DavisTestimony.pdf.

whether they have the required ID to vote and, if not, either obtain that ID or determine the correct processes in the jurisdiction for bypassing that requirement.[17] Not only do low-income voters disproportionately lack the types of photo ID that many states now require, and lack the resources to obtain them,[18] voter ID laws have created such confusion among the elec-

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[17] *See* Nat'l Conference of State Legislatures, Voter Identification Requirements (2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx, for a description of the many different ID requirements and schemes now in place. For example, in Wisconsin, statutory ID is required to vote but, per court order, the DMV is required to issue a valid voting credential to any voter that starts the petition process. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 901 (W.D. Wis. 2016).

[18] *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc) (affirming District Court holding that Texas voter ID law violates Section 2 of the Voting Rights Act) ("The district court likewise concluded that SB 14 disproportionately impacts the poor, who are disproportionately minorities. It credited expert testimony that 21.4% of eligible voters earning less than $20,000 per year lack SB 14 ID, compared to only 2.6% of voters earning between $100,000 and $150,000 per year. Lower income respondents were also more likely to lack the underlying documents to get an EIC."); *Frank v. Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wis.) *rev'd on other grounds* 768 F.3d 744 (7th Cir. 2014) ("Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty. Individuals who live in poverty are less likely to drive or participate in other activities for which a photo ID may be required (such as banking, air travel, and international travel), and so they obtain fewer benefits from possession of a photo ID than do individuals who can afford to participate in these activities. In addition, . . . low-income individuals who would like to obtain an ID generally find it harder to do so than do those with greater resources.").

torate that many voters just give up and assume their inability to provide the right kind of identification.[19]

Finally, a voter who can take time away from work, arrange childcare, and transportation to the correct polling place, and has the required proof of identification in hand, may find that she has not allocated sufficient time to vote when she arrives to find a long line in front of her. In 2012, ten percent of voters waited in line for over half an hour to cast a ballot and over three million voters waited more than an hour.[20] Ohio is certainly not immune to these problems. In one survey of the 2004 election, researchers estimated that 174,000 voters in Ohio left their polling place without voting.[21]

And the burdens of long lines do not fall evenly on all voters. In fact, they often fall on those who face other obstacles to voting and who can least afford to spend the additional time waiting in line. Recent research shows that wait times in minority neighborhoods, which are also disproportionately

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[19] Mark Jones, Renée Cross & Jim Granato, Univ. of Houston, Hobby School of Pub. Affairs, The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23 (2017), http://www.uh.edu/class/hobby/voterid2016/voterid2016.pdf (finding that non-voters cited lack of required ID as a reason for not voting, even where they actually had a qualifying ID).

[20] Stephen Pettigrew, *The Race Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 Pol. Sci. Q. 527, 527 (forthcoming 2017), http://www.stephenpettigrew.com/articles/pettigrew-2017-psq.pdf.

[21] Ari Berman, *Ohio GOP Resurrects Voter Suppression Efforts*, The Nation, Dec. 4, 2013, https://www.thenation.com/article/ohio-gop-resurrects-voter-suppression-efforts/.

poor, are about twice the length of wait times in mostly white neighborhoods and that "minority voters are three times as likely to wait longer than 30 minutes and six times as likely to wait more than 60."[22]

All of these increased obstacles to voting—polling place changes, long lines, transportation problems and costs, and scheduling difficulties due to irregular and inflexible work schedules that do not provide time off to vote—fall doubly hard on low-income voters because "they possess few of the resources needed to overcome those costs."[23] Empirical evidence shows that increases in costs to voting that might appear "equal" because they affect all voters actually have far greater impact on working people and low-income voters who have fewer spare resources available to absorb these costs.[24]

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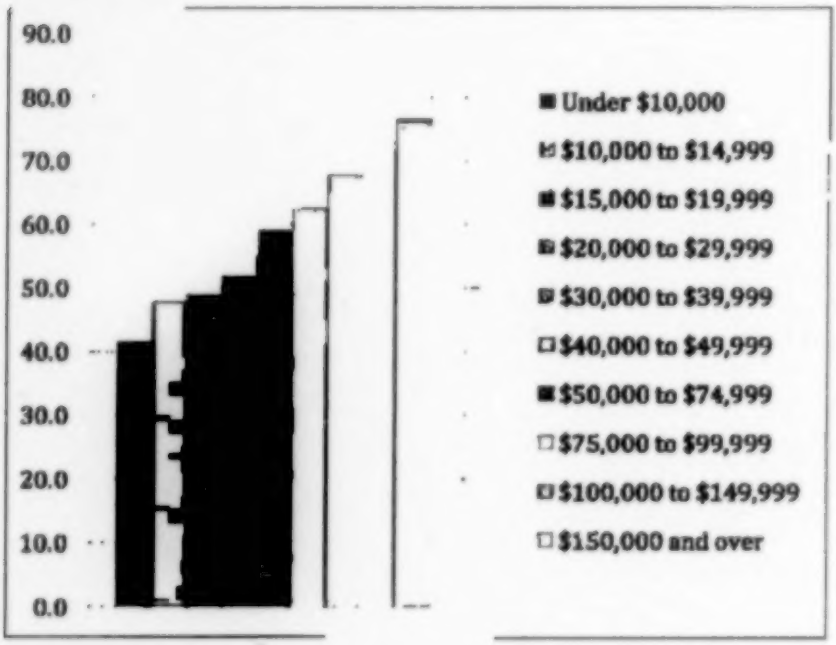
[22] Pettigrew, *supra* note 20, at 527. Other studies have found this racial gap in wait times as well. *See* Charles Stewart III & Stephen Ansolabehere, *Waiting to Vote*, 14 Election L.J. 47 (2013), https://dspace.mit.edu/openaccess-disseminate/1721.1/110798; U.S. Gov't Accountability Office, Observations on Wait Times for Voters on Election Day (2012), http://www.gao.gov/assets/670/666252.pdf.

[23] *See supra* note 11; *see also Veasey v. Perry*, 71 F. Supp. 3d 627, 665 (S.D. Tex. 2014) ("The poor also feel the burden most acutely. The concept is simple—a $20.00 bill is worth much more to a person struggling to make ends meet than to a person living in wealth.").

[24] *See* Roscigno, *supra* note 15, at 17 (citing Benjamin Highton, *Early Registration and Voter Turnout*, 59 J. Pol. 565 (1997) and Raymond E. Wolfinger, Benjamin Highton & Megan Mullin, *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 St. Pol. & Pol'y Q. 1 (2005)).

The natural result of the foregoing is dramatically lower turnout among low-income voters. Lower turnout among low-income voters has been an unfortunate but persistent feature of elections over time.[25] In 2016, less than forty-six percent of eligible adults with family incomes under $20,000 voted whereas over seventy-eight percent of eligible adults with family incomes $100,000 and over voted.[26] In fact, higher income correlates with a steady increase in likelihood of voting.

Figure 2.[27]



[25] Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote*, The Atlantic, Jan. 10, 2014, https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.

[26] U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members, by Age and Family Income: Nov. 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table07.xls.

[27] *Id.*

Over twelve percent of the citizen voting-age population, or over 27 million eligible voters, lives below the official poverty line.[28] These voters, and many other working people, face increased obstacles to voting and thus vote at a much lower rate than their more well-resourced peers.[29]

Political science literature talks about the effects of "costs" of voting in terms of the "calculus of voting," wherein individuals and groups calculate the costs and benefits of voting in deciding whether to cast a ballot; turnout will go up or down depending on those costs.[30] But for many workers and for many low-income and homeless voters, it may not really be a matter of choice in every election. There may be years when the obstacles stack up to prevent even motivated voters from getting to the polls. If Secretary Husted's purge procedures are permitted to remain in place, these voters will be removed from the registration rolls without any evidence of relocation

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[28] U.S. Census Bureau, Electorate Profiles: Selected Characteristics of the Citizen, Voting-Age Population (2016), https://www2.census.gov/programs-surveys/demo/tables/voting/UnitedStates.xlsx.

[29] Because the poverty rate for Black and Latino citizens is double the poverty rate for White voters, these burdens also fall disproportionately on communities of color. U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Poverty Status in the Past 12 Months, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

[30] *See, e.g.*, Anthony Downs, An Economic Theory of Democracy (1957); John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246 (1993); M.E. Kropf, *Does Early Voting Change the Socio-Economic Composition of the Electorate?*, 4 Poverty & Pub. Pol'y 1 (2012).

and will be required to reregister. The NVRA—designed to lower barriers for precisely these voters—will be used to further shunt them away from the political process.

b. Disabled and older voters face substantial obstacles to the ballot box.

Many voters face additional, often cumulative, obstacles to voting because they have disabilities, a vulnerability also associated with being older. Some of these obstacles result from failures of our election system, while others are largely outside of the government's control. In either event, eligible voters often can't make it to the polls,[31] sometimes for several elections. They should not face additional obstacles when they are able to cast a ballot.

People with disabilities represent a major sector of the American electorate. Based on Census estimates, there are at least 35 million voting age people with disabilities—representing nearly one in six voting

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[31] To be sure, many states have improved access to voting for senior citizens and people with disabilities through measures like vote by mail or no-fault absentee voting. Indeed, turnout among voters with disabilities is higher where these mechanisms are available. Lisa Schur, Meera Adya & Douglas Kruse, Research Alliance for Accessible Voting, Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections (2013), https://www.eac.gov/assets/1/1/Disability%20and%20voting%20survey%20report%20for%202012%20elections.pdf. However, these mechanisms for voting are neither ubiquitous nor without their own difficulties for voters with disabilities. About 10% of voters with disabilities that voted by mail reported difficulties voting and a majority of voters with disabilities report a preference for voting in person. *Id.*

age people—and that estimate is considered conservative and growing.[32]

But, despite legislative protections, our elections are still not well equipped to ensure equal access for these voters. A 2008 Government Accountability Office report found that over seventy percent of polling places were not fully accessible and twenty-seven percent of polling places had physical impediments and failed to offer curbside voting as an alternative.[33] The report also found that nearly one-half of voting systems inside polling places were not set up to accommodate users in wheelchairs.[34] Over thirty percent of voters with disabilities who did vote in 2012 reported one or more difficulties in voting.[35]

Obstacles for people with disabilities include inaccessible polling places with steps, stairs, or poor surfaces; lack of accessible transportation to polling places; long lines at polling places; and inaccessible voting systems that make it difficult for voters with

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[32] *Id.* at 1 (noting that "a larger estimate of 46 million people with disabilities age 21 or older is based on a more expansive disability definition using the 2005 Survey of Income and Program Participation"); *see also* Lisa Schur & Douglas Kruse, Projecting the Number of Eligible Voters with Disabilities in the Nov. 2016 Elections (2016), https://smlr.rutgers.edu/sites/default/files/documents/faculty_staff_docs/Kruse%20and%20Schur_Disability%20electorate%20projections%202016_9-8-16.pdf.

[33] U.S. Gov't Accountability Office, Voters with Disabilities: Challenges to Voting Accessibility 11 (2013), https://www.gao.gov/assets/660/654099.pdf.

[34] *Id.*

[35] Schur, Adva & Kruse, *supra* note 31, at 6.

impairments—particularly visual ones—to read or mark their ballots privately and independently.

Twenty percent of nonvoters with disabilities (both registered and not) reported that the reason they did not vote was that they had "an illness or disability [that] made it too difficult to vote."[36] In another survey from 2008, almost one-fourth of disabled nonvoters reported transportation as a major factor in the reason they did not vote.[37]

People with disabilities consistently vote at rates lower than people without disabilities. In one study, the gaps in turnout based on disability in 2012, 2010, and 2008 were 5.7, 3.1, and 7.2 percent respectively.[38] But after controlling for age, education, and other characteristics, the gap was higher—about eight percentage points in each year.[39] In other words, if voters with disabilities voted at the same rate as otherwise similarly situated eligible voters without disabilities, there would be about 3 million more voters.[40]

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[36] Ruth Igielnik, *A Political Profile of Disabled Americans*, Pew Research Ctr., Sept. 22, 2016, http://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans/.

[37] Thad E. Hall & R. Michael Alvarez, Information Tech. & Innovation Found., Defining the Barrier to Political Participation for Individuals with Disabilities (2012), http://elections.itif.org/wp-content/uploads/AVTI-001-Hall-Alvarez-2012.pdf.

[38] Schur, Adva & Kruse, *supra* note 31, at 4. In another study, Pew Research Center found a similar gap of 5 points in the 2014 midterm elections. Igielnik, *supra* note 36.

[39] Schur, Adva & Kruse, *supra* note 31, at 4.

[40] *Id.*

The turnout gap for people with disabilities exists even for registered voters with disabilities. While there is a small gap in registration rates—approximately two percent—more of the participation gap is caused by registered voters who do not turn out to vote, indicating that it is obstacles to the act of voting that drive much of the turnout gap for voters with disabilities.[41] Moreover, this gap is *not* caused by higher apathy or lack of interest in elections among people with disabilities. Indeed, a study by the Pew Research Center shows that individuals with disabilities were actually *more* interested in the 2014 midterm elections and its outcomes than people without disabilities.[42]

The burdens of accessing the right to vote can be particularly high for seniors with disabilities, who represent over one third of the senior population and over fifty percent of those over 75 years old.[43] Seniors, including seniors with disabilities, are very motivated members of the electorate but too often disability, illness, and transportation difficulties stand in the way of their casting ballots. While eighty-four percent of seniors with disabilities thought "it really matters who wins the election" in 2014, the gap in voting between seniors with and without disabilities was stark.[44] In 2014, sixty-nine percent of seniors with disabilities re-

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[41] *Id.* at ii.

[42] Igielnik, *supra* note 36.

[43] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Disability Characteristics, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S1810/0100043US.

[44] Igielnik, *supra* note 36.

ported voting compared to eighty-six percent of seniors without disabilities, a seventeen point gap.[45] About one third of registered non-voting seniors in the 2016 election reported that illness or disability was the reason they did not vote.[46]

Older voters face much greater transportation difficulty than their younger counterparts. In 2016, registered non-voters 65 years and older were more than twice as likely as any other age group to report transportation problems as their reason for not voting.[47]

And in recent years, older voters have faced new obstacles in light of new voter photo ID provisions. The Brennan Center estimates that eighteen percent of senior citizens—many of whom no longer drive[48]—do not have current government-issued photo ID.[49] And many seniors are particularly unlikely to have the necessary documentation to obtain new ID.

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[45] *Id.*

[46] U.S. Census Bureau, Table 10, Reasons For Not Voting, By Selected Characteristics: Nov. 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table10.xls.

[47] *Id.*; *see also* Transportation for America, Aging in Place: Stuck Without Options (2011), http://t4america.org/docs/SeniorsMobilityCrisis.pdf (discussing the mobility crisis for this generation of seniors); AARP Pub. Pol'y Inst., How the Travel Patterns of Older Adults are Changing 4 (2011), https://assets.aarp.org/rgcenter/ppi/liv-com/fs218-transportation.pdf (reporting that 20.5% of individuals 65 years or older no longer drive).

[48] *Id.*

[49] Brennan Ctr. for Justice, Citizens Without Proof: A Survey of American's Possession of Documentary Proof of Citizenship and Photo Identification 3 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

For example, Floyd Carrier, a plaintiff in the Texas voter ID litigation pending in the Fifth Circuit, is an 86-year old disabled veteran with an expired driver's license because he no longer drives. He was born at home and does not have a birth certificate and thus has been unable to obtain the necessary ID to vote in person in Texas. In 2013, his son drove him to his regular polling location to vote curbside, as he had done for forty years. But because he did not have the proper type of photo ID, he was not permitted to vote.[50]

Mr. Carrier's case is not an isolated anecdote, but representative of the experience of many older voters. Voter ID cases in Pennsylvania and North Carolina have produced similar evidence.[51] Many older voters were born when births often went unrecorded and as a result do not have a birth certificate, the most commonly required documentation for driver's licenses and other forms of government photo ID.[52]

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[50] *Veasey*, 71 F. Supp. 3d at 668, 670.

[51] *See, e.g.*, Compl. at 7–9, *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (2016) (No. 13-cv-658) (allegations of plaintiff Rosanell Eaton, a 92-year-old African American woman who was born at home and whose certified birth certificate does not match the name on her driver's license or the name on her voter registration card); Verified Pet. for Review at 7, 9, 11, *Applewhite v. Commonwealth*, No. 330 MD 2012 (Commw. Ct. Pa. Oct. 2, 2012) (allegations of African-American Pennsylvania resident plaintiffs Wilola Shinholster Lee, Gloria Cuttino, and Dorothy Barksdale, whose states of birth—Georgia, South Carolina, and Virginia, respectively—have no record of their birth).

[52] *See* Sam Shapiro, *Development of Birth Registration and Birth Statistics in the U.S.*, 4 Population Stud. 86, 97 Fig. 2 (1950) (4.8% of Ohio births in 1940 unrecorded).

This problem is especially acute for older voters of color, a disproportionate share of whom were born outside hospitals.[53]

Obstacles for older voters, voters with disabilities, and especially for older disabled persons are further compounded when those individuals are *also* living in poverty and therefore face the resource obstacles described above. Unfortunately, these interdependent struggles are far from unusual. People with disabilities are twice as likely to live in poverty as people without disabilities.[54] Similarly, based on the supplemental poverty measure, which takes into account healthcare costs, the Census Bureau estimates that nearly fifteen percent of senior citizens are living in poverty.[55]

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[53] An estimated 23% of U.S. births outside of hospitals in 1940 went unregistered; "about three in four of the non-white infants [that year] were born at home." *Id.* at 99. The same year 6.3% of non-white births and 4.7% of white births in Ohio went unrecorded. Joseph Schachter & Sam Shapiro, *Birth Registration Completeness, U.S., 1950*, 67 Pub. Health Reps. 513, 522 Tbl. 4 (1952).

[54] Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NPR, July 23, 2015, 3:38 PM, http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law.

[55] U.S. Census Bureau, The Supplemental Poverty Measure: 2016 (2017), https://www2.census.gov/programs-surveys/demo/tables/p60/261/ErratumTable.xlsx.

II. OHIO'S REMOVAL PROCEDURE IMPOSES SUBSTANTIAL BURDENS ON REGISTERED VOTERS WITHOUT EVIDENCE OF ANY CHANGE IN ELIGIBILITY STATUS.

At the heart of this case is an incorrect presumption, most plainly stated by *amicus curiae* Buckeye Institute: "[if] a voter has not voted for several years and has failed to respond to confirmation notices, a presumption arises that he or she no longer meets the state's residency qualification." Brief of *Amicus Curiae* The Buckeye Institute in Support of Petitioner at 15. Given the foregoing data regarding the significant obstacles faced by large sectors of the electorate, this presumption is unreasonable and reliance on it to impose additional burdens on voters raises serious constitutional concerns.

As described above, many Americans face numerous overlapping and compounding obstacles to voting—some exacerbated by the state, others external—that can explain failure to vote for several elections. For that reason, it is discouraging but not surprising that analysis of Ohio's "Supplemental Process" has shown that it disproportionately impacts voters in poor neighborhoods.[56]

But, as the NVRA clearly states, nonvoting does not indicate ineligibility. A voter with a chronic dis-

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[56] *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016, https://www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D.

ease who has missed several elections due to bouts of illness should not arrive at the polls to find herself removed from the registration rolls and unable to vote. Likewise, an impoverished senior citizen who has not voted for several cycles due to lack of transportation should not find himself unable to vote if a new neighbor offers to bring him to the polls.

Petitioner Husted argues that the challenged process does not remove voters solely for failing to vote because Ohio sends these registered voters notices and does not remove them *if* they affirmatively respond to that notice. *See* Petitioner's Merits Brief. Beyond the reasons why this is a flawed reading of the statute as a whole, *see* Respondents' Merits Brief, this reading of the statute would undermine the clearly stated goals of the NVRA. In both the House and Senate reports, the committees principally responsible for crafting the NVRA explained that the removal provisions were intended to prevent states from removing "any person from the official list because of failure to vote" or "solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15 (1993); S. Rep. No. 103-6, at 31 (1993).

Congress barred removal from registration based on non-voting, with or without an accompanying non-response, for good reason. This bar directly serves Congress's goal of reducing registration barriers to an "absolute minimum" and fulfills the statute's purpose to "promote the exercise of [the fundamental] right [to vote]." H.R. Rep. No. 103-9, at 3. For many of the most vulnerable communities that the NVRA is designed to protect, providing a single notice of possible removal does not meaningfully miti-

gate what is still the equivalent of removal for failure to vote.

Moreover, the notice procedure is likely to impose additional burdens on many of the voters already facing obstacles to vote. For this reason, while it is a perfectly reasonable mechanism for *confirming* a change in residence, it is too flawed a mechanism for *assuming* one. A few of the attendant problems with a notice procedure based on failure to vote are described below.

First, homeless voters or voters without traditional residential addresses have the same right to vote as all other citizens. *See Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."). Yet voters without traditional residential addresses will not receive any mailed notice from the Secretary of State. In fact, Ohio allows homeless voters to use intersections and other non-traditional addresses as their residences for purposes of registration.[57] Therefore, for homeless voters, the Secretary of State's program cannot be characterized as anything other than a re-registration requirement for non-voting, in violation of the NVRA.

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[57] "In Ohio, a mailing address is required if it exists. If not, a geographical description is required." Nat'l Coal. for the Homeless, "You Don't Need a Home to Vote," Voting Rights: Registration Manual 23 (2016), http://nationalhomeless.org/wp-content/uploads/2016/04/Voting-Manual.pdf (listing the various laws for all fifty states and the District of Columbia).

Second, the notice will also be largely ineffective for voters with low literacy skills. According to the 2003 National Assessment of Adult Literacy, twelve percent of adults in the United States have below basic document literacy (defined as "the knowledge and skills needed to perform document tasks").[58] The rate of low literacy skills among voters with disabilities is higher than among their peers without disabilities. The gap in reading proficiency between students with and without disabilities is over twenty percentage points due, at least in part, to gaps in educational opportunities.[59] Similar gaps in reading proficiency also persist for low-income students.[60]

Third, printed mail notices will be similarly ineffective for many other disabled or older voters. They are not accessible for blind individuals. They are less likely to reach individuals who often have extended stays outside their permanent residences in hospitals or other health care facilities. And for those voters permanently residing in group residences such as nursing homes and health care facilities, delivery of the notice depends on the effectiveness and efficiency of their facilities' mail delivery systems.

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[58] Nat'l Ctr. For Educ. Statistics, Assessment of Adult Literacy, A First Look at the Literacy of America's Adults in the 21st Century (2006), https://nces.ed.gov/NAAL/PDF/2006470.PDF. An example of document literacy is the ability to fill out a certified mail receipt based on given information. *Id.*

[59] Nat'l Educ. Ass'n, Understanding the Gaps: Who Are We Leaving Behind—And How Far 3 (2015) https://www.nea.org/assets/docs/18021-Closing_Achve_Gap_backgrndr_7-FINAL.pdf.

[60] *Id.*

Finally, for all other voters, the requirement to respond to a notice—absent any evidence of their ineligibility—represents an additional unjustified bureaucratic hurdle to voting. While responding to a prepaid return card is designed to be relatively easy, the ease or difficulty of completing this task depends on the above factors as well as a voter's education level and resources. Social science research shows that scarcity of resources—of time, opportunities, or money—can have significant impact on an individual's attention to anything other than the present scarcity.[61] In other words, low-income and resource-strained voters may be likely to overlook a single notice regarding a faraway election while they are focused on everyday difficulties. Since Ohio has no reliable reason to believe that these voters have relocated, requiring

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[61] *See, e.g.*, Anuj Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 Sci. 682, 682 (2012). The authors explain various experiments demonstrating that:

> Having less elicits greater focus. . . . This view is not bound to the specific circumstances of poverty, nor does it make assumptions about the dispositions of the poor. This mindset stems from the most fundamental feature of poverty: having less. And this hypothesis is about scarcity more generally, not just poverty. Indeed, just as expenses capture the attention of the poor, researchers have found that people who are hungry and thirsty focus more on food- and drink-related cues . . . .
>
> Because scarcity elicits greater engagement in some problems, it leads to neglect of others. While focusing on the groceries from week to week, we might neglect next month's rent.

Id.

voters to clear this hurdle in order to vote is both unnecessary and unjustifiably burdensome.

The result of the foregoing is unsurprising. Ohio's "Supplemental Process" leads to the disenfranchisement of thousands of eligible voters. In November 2016, if not for the relief ordered by the district court, 7,515 eligible Ohioans would have been disenfranchised. *See* Respondents' Brief at 20.

III. INITIATING THE REMOVAL PROCESS BASED ON NON-VOTING UNDERMINES THE NVRA'S EXPRESS PURPOSES AND RAISES CONSTITUTIONAL CONCERNS.

Older Americans, low-income and homeless Americans, and Americans with disabilities represent a diverse and substantial sector of the electorate. They all face substantial obstacles to voting that may lead to their absence from the polls for several cycles regardless of their desire and eligibility to vote. Forcing these voters to follow additional bureaucratic steps to stay on or return to the voter registration rolls is directly contrary to the NVRA's goal of lowering barriers for precisely these voters. Moreover, Ohio's imposition of bureaucratic hurdles and/or re-registration on these voters based only on their non-voting raises grave constitutional concerns. The canon of constitutional avoidance counsels against interpreting the NVRA to allow such a system.

Constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v.*

Martinez, 543 U.S. 371, 381 (2005). Its application is particularly apt in this case, where Congress was clear that its intent was to preserve and promote the "fundamental right" to vote. 52 U.S.C. § 20501. Thus, where two interpretations of a provision are available, the Court can easily assume that Congress' intent was not to allow a scheme that would unjustifiably burden the right to vote.

The right to vote is a "fundamental political right . . . preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (internal quotation marks and citations omitted). As such, when confronting burdens on the right to vote, courts must balance the burden on the right to vote against the state's justifications and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Here, the burden on the right to vote is substantial. Apropos of nothing other than nonvoting, Ohio places bureaucratic hurdles between eligible voters and continued political participation. As discussed above, it is likely that many *eligible* voters—including voters without traditional addresses and with low literacy skills—will not respond to the notice and therefore will be required to re-register in order to vote. Many voters will not be aware that they were struck from the rolls and when they appear to vote on Election Day will not be able to vote.[62] The consequence

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[62] The Voting Technology Project at CalTech/MIT estimates that millions of votes are already lost nationwide due to registration problems that voters discover on Election Day. CalTech/MIT Voting Tech. Project, Voting: What Has Changed, What

of Ohio's purge program for these voters will be the ultimate burden on the right to vote: complete disenfranchisement for that election.

It is well recognized that the duty to register is the primary obstacle to voting. Indeed, the NVRA was motivated by the well-founded belief that increasing access to registration would increase overall participation. H.R. Rep. No. 103-9, at 3 ("Public opinion polls, along with individual testimony . . . , indicate that failure to become registered is the primary reason given by eligible citizens for not voting. It is generally accepted that over 80 percent of those citizens who are registered vote in Presidential elections. . . . Expanding the rolls of the eligible citizens who are registered is no guarantee that the total number of voters will increase, but it is one positive action Congress can take to give the greatest number or people an opportunity to participate.")

Registration problems are routinely among the top problems reported on Election Day to election protection hotlines.[63] And same-day registration consis-

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Hasn't, & What Needs Improvement 27 (2012), vote.caltech.edu/documents/146/Voting_Technology_Report_1_14_2013.pdf. Allowing states to purge voters from the rolls without any basis for believing they are no longer eligible residents will certainly add to this number.

[63] Lawyers' Comm. for Civil Rights Under Law, 2010 Election Protection Report 4 (2010), https://www.866ourvote.org/newsroom/publications/body/Election-Protection-2010-Report.pdf (noting registration problems as a persistent problem in 2004, 2006, 2008, and 2010) (registration problems were the most common type of problem reported in 2004 and 2008); Lawyers' Comm. for Civil Rights Under Law, 2014 Election Protection

tently increases turnout in states—unlike Ohio—that have it,[64] indicating that many voters stay home on Election Day simply because they are not registered.

As discussed above, the burdens of re-registration will fall especially hard on those voters that already face substantial obstacles to voting. For those voters without easy access to technology (of which there are many),[65] re-registration may require a separate trip to an agency that can assist with registration. It will pose a particular challenge for voters with low-literacy skills and homeless voters who have to navigate a maze of laws regarding what address they can use to register.[66] Moreover, several states have passed laws in recent years increasing the difficulty of registration.[67] Finally, voter registration is particularly

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Report 4 (2015), https://www.866ourvote.org/newsroom/publications/body/2014-EP-Full-EP-Report-Print-Version.pdf (reporting 24.5% of calls were concerning voter registration).

[64] *See, e.g.*, Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 Soc. Sci. Q. 171, 178 (2001); Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 Am. Pol. Q. 74, 84 (1994); Stephen Knack, *Election Day Registration: The Second Wave*, 20 Am. Pol. Q. 65, 76 (2001).

[65] *See* Anderson, *supra* note 9.

[66] *See* Nat'l Coal. for the Homeless, *supra* note 57 (listing the various laws for all fifty states and the District of Columbia).

[67] *See, e.g, League of Women Voters v. Newby*, 838 F.3d 1, 4 (D.C. Cir. 2016) (challenging the Election Assistance Commission Executive Director's decision to allow three states with documentary proof of citizenship requirements for registration to enforce those requirements on the federal form).

hard for voters with disabilities because of the inaccessibility of many states' voter registration sites. In a recent study, the ACLU found that only *one* state website had an accessible online voter registration form for people who use screen readers (technology that translates speech to text).[68]

Weighed against these significant burdens is the state's asserted interest in ensuring that its voter registration rolls are current and accurate. While that is certainly an important goal, courts must consider "the extent to which [that interest] make[s] it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

Where a jurisdiction's NVRA notice procedure is initiated by change-of-address information supplied by the National Change of Address (NCOA) program, as in the "safe harbor" procedure, or where a jurisdiction has another reason to believe a voter may no longer be eligible (such as a death certificate matching the voter's identity), the burdens the removal process places on the right to vote described above are reasonable because the process furthers the state's purpose of maintaining accurate voter registration rolls.

But here, where Ohio seeks to purge voters without *any* credible evidence that they are no longer eligible to vote, Ohio has not and cannot show that this pro-

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[68] ACLU, Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities (2015), https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities.

cess is "necessary" to achieving that goal.[60] To the contrary, it undermines that goal by removing thousands of eligible voters from the registration rolls. That is precisely why forty-three states do not follow the Ohio model but instead have developed other criteria, actually related to proof of a residence change, for maintaining their rolls. *See* Respondents' Brief at 14-16.

In sum, the Ohio "Supplemental Process" imposes substantial burdens on countless voters and disproportionately burdens low-income and other vulnerable voters, compounding the many other obstacles to voting they already face. It does so absent evidence that these voters' eligibility has changed and therefore does not further the state goal of accurate list maintenance. Such a program not only contravenes the NVRA's language and undermines its goals but also is of doubtful constitutional legitimacy. The Court should not allow it to continue.

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[60] The NCOA safe harbor procedure provides an alternative means of achieving this goal. The *amicus* brief on behalf of the National Conference of State Legislatures provides examples of many other state procedures for keeping registration rolls current that do not involve placing voters into a removal process solely based on failure to vote. *Amicus* Brief of Nat'l Conference of State Legislatures at 7.

CONCLUSION

For the foregoing reasons and those stated in Respondents' brief, *amici* urge this Court to affirm the ruling below.

September 22, 2017

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RECORD AND BRIEFS

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IN THE

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JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, KENTUCKY, MARYLAND, NEW MEXICO, OREGON, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Ohio's "Supplemental Process"—which relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violates the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote."

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Cases **Page(s)**

Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995) 2

Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971) 5,30

Dunn v. Blumstein, 405 U.S. 330 (1972) 13

Michigan State UAW Cmty. Action Program Council (CAP) v. Austin, 387 Mich. 506 (1972) 14,15

Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Texas 2017) 5

Rosario v. Rockefeller, 410 U.S. 752 (1973) 30

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 4,5

Wit v. Berman, 306 F.3d 1256 (2d Cir. 2002) 31

Young v. Fordice, 520 U.S. 273 (1997) 6,7

Constitutions, Laws & Regulations

Federal

Pub. L. 103-31, 107 Stat. 77 (1993) 9

52 U.S.C.
§ 10301 5
§ 20501 1,6
§§ 20503-20506 7
§ 20507 ..... passim
§ 21083 9,10

Constitutions, Laws & Regulations **Page(s)**

State

Ala. Code § 17-4-30 23

Ariz. Rev. Stat. § 16-166 23

Ark. Const.
amend. 51, § 10 23
amend. 51, § 11 23

Cal. Elec. Code
§ 2102 2
§ 2220 23
§ 2223 23
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Colo. Rev. Stat. § 1-2-605 23

Conn. Gen. Stat.
§ 9-21 25
§ 9-32 23
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Del. Code
title 15, § 1704 25
title 15, § 1707 25

D.C. Mun. Regs. tit. 3, § 519.1 24

Fla. Stat. § 98.065 24

Haw. Rev. Stat. § 11-17 2

Constitutions, Laws & Regulations **Page(s)**

Ill. Admin. Code tit. 26, § 216.50 2

Md. Code Ann.,
Elec. Law § 3-502 24
Elec. Law § 3-504 24

Neb. Rev. Stat. § 32-329 23

N.M. Stat. Ann. § 1-4-28 23

N.Y. Elec. Law
§ 4-117 23
§ 5-102 2
§ 5-104 2
§ 5-712 24,25

N.Y.C.R.R. tit. 9, § 6217.8 25

Ohio Rev. Code § 3503.19(C)(3) 24

Or. Rev. Stat.
§ 247.013 16
§ 247.017 16
§ 807.130 16

Or. Admin. R. 165-005-0180 16

Pa. Cons. Stat., tit. 25, § 1901(b)(3) 16

R.I. Gen. Laws
§ 17-5-3 23
§ 17-9.1-26 24

Constitutions, Laws & Regulations **Page(s)**

Va. Code
§ 24.2-404 24,26
§ 24.2-427 25,26
§ 24.2-428.1 24

Vt. Stat. tit. 17, § 2150 24

Wash. Rev. Code
§ 29A.08.135 26
§ 29A.08.620(4)(a) 24

Miscellaneous Authorities

Alvarez, R. Michael, et al., *Interstate Voter Registration Database Matching: the Oregon-Washington 2008 Pilot Project* (Aug. 10, 2009), http://tinyurl.com/Alvarez-OreWashProjec 27

Alvarez, R. Michael, Thad E. Hall & Morgan Llewellyn, *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 Stan. L. & Pol'y Rev. 382 (2007) 4,30

Barber, Steve, et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 499 (1988) 8

Belt, Rabia, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 Stan. L. Rev. 1491 (2016) 21

Black's Law Dictionary (10th ed. 2014) 16

Miscellaneous Authorities **Page(s)**

Brennan Ctr. for Justice, *Automatic Voter Registration*, https://www.brennancenter.org/analysis/automatic-voter-registration 11

California Sec'y of State, *California Online Voter Registration*, https://registertovote.ca.gov/ 11

California Sec'y of State, *My Voter Status*, https://voterstatus.sos.ca.gov/ 11

Caltech/MIT Voting Tech. Project, *Voting: What Is, What Could Be* (July 2001), http://vote.caltech.edu/documents/153/voting_what_is_what_could_be.pdf 14,15

Commission on Fed. Election Reform, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (Sept. 2005), http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/375 19,29

Congressional Research Serv., *The National Voter Registration Act of 1993: History, Implementation, and Effects* (Sept. 2013), https://archive.org/details/R40609TheNationalVoterRegistrationActof1993HistoryImplementationandEffects-crs 5

Cunningham, Dayna L., *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 Yale L. & Pol'y Rev. 370 (1991) 3,17,30

Miscellaneous Authorities **Page(s)**

Electronic Registration Info. Ctr., *Who We Are,* www.ericstates.org/whoweare 27

Electronic Registration Info. Ctr., Summary of Membership Guidelines and Procedures, http://www.ericstates.org/images/documents/ERIC_Membership_Summary_v1.0.pdf 27

Goel, Sharad, et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Jan. 13, 2017), http://tinyurl.com/Goel-OnePersonOneVote 28

H.R. Rep. No. 103-9 (1993) ..... passim

H.R. Rep. No. 107-329, pt. 1 (2001) 9,26

Keyssar, Alexander, *The Right to Vote* (rev. ed. 2009) 10

Leighley, Jan E., & Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* (2014) 20,21

Letter from Eric T. Schneiderman to Hon. Elijah E. Cummings et al., dated Feb. 22, 2017, https://ag.ny.gov/sites/default/files/2017.02.22_ltr_to_cummings_brady_clyburn_re_voter_fraud.pdf 32

Miscellaneous Authorities **Page(s)**

National Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001), http://web1.millercenter.org/commissions/comm_2001.pdf 14,29

National Research Council, *Improving State Voter Registration Databases* (2010), http://nap.edu/12788 24,25,26

New York State Att'y Gen., *A Report on Voter Access in the 2016 Presidential Primary* (Dec. 2016), https://ag.ny.gov/sites/default/files/2016_statewide_elections_report.pdf 30

Orange County (Calif.) Registrar of Voters, *Voter Registra_tion Accuracy and Voter List Maintenance* (2012), https://www.ocvote.com/election-library/docs/2012%20Voter%20List%20Maintenance.pdf 26

Overton, Spencer, *Voter Identification*, 105 Mich. L. Rev. 631 (2007) 21

The Pew Charitable Trusts, *Election Security in America* (Mar. 8, 2017), http://www.pewtrusts.org/en/research-and-analysis/q-and-a/2017/03/election-security-in-america 29,32

Miscellaneous Authorities **Page(s)**

The Pew Charitable Trusts, *Electronic Registration Information Center,* http://www.pewtrusts.org/en/projects/election-initiatives/about/upgrading-voter-registration/eric 27

The Pew Charitable Trusts, *National Disability Voter Registration Week Promotes Election Access,* http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/07/13/national-disability-voter-registration-week-promotes-election-access 20

Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (Jan. 2014), https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf 26,31

Republican Nat'l Lawyers Ass'n, *RNLA Response to the Report and Recommendations of the Presidential Commission on Election Administration* (April 2014), http://www.rnla.org/pecaresponse.pdf 31

Robertson, Campbell, *Millions on Election Day Make a Different Decision: Not Voting,* N.Y. Times, Nov. 8, 2016, https://www.nytimes.com/2016/11/09/us/politics/voter-turnout.html 14,15

Miscellaneous Authorities **Page(s)**

S. Rep. No. 103-6 (1993) ..... passim

Tokaji, Daniel P., *Voter Registration and Election Reform*, 17 William & Mary Bill of Rights J. 453 (2008) 4,19

U.S. Census Bureau, *An Examination of Self-Response for Hard-to-Interview Groups When Offered an Internet Reporting Option for the American Community Survey* (Sept. 4, 2015), https://www.census.gov/content/dam/Census/library/working-papers/2015/acs/2015_Nichols_01.pdf 17

U.S. Census Bureau, *Blacks Voted at a Higher Rate than Whites in 2012 Election—A First, Census Bureau Reports* (May 8, 2013), https://www.census.gov/newsroom/press-releases/2013/cb13-84.html 18,19

U.S. Census Bureau, *Census Bureau Reports Congressional Voting Turnout Is at Lowest Mark Since 1978* (July 2015), https://www.census.gov/newsroom/press-releases/2015/cb15-122.html 19

U.S. Census Bureau, *Census Bureau Statistics Explore Voting Patterns of Young Adults* (April 2014), https://www.census.gov/newsroom/press-releases/2014/cb14-74.html 19

Miscellaneous Authorities **Page(s)**

U.S. Census Bureau, *CPS Historical Migration / Geographic Mobility Tables* (Nov. 2016), https://www.census.gov/data/tables/time series/demo/geographic-mobility/historic.html 15

U.S. Census Bureau, *Percent Voted by Educational Attainment,* https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/a2-educational.jpg 20

U.S. Census Bureau, *Percent Voted by Labor Force Status: Congressional Elections,* https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/a2-educational.jpg 20

U.S. Census Bureau, *Percent Voting by Labor Force Status: Presidential Elections,* https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/a2-presidential.jpg 20

U.S. Census Bureau, *State-to-State Migration Flows* (2015), https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html 28

U.S. Census Bureau, *Voting Hot Report,* https://thedataweb.rm.census.gov/TheDataWeb_HotReport2/voting/voting.hrml 14,18,20

Miscellaneous Authorities **Page(s)**

U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election*, https://census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html 14,18,19

U.S. Census Bureau, *Voting Rate by Race and Hispanic Origin* (May 2017), https://www.census.gov/library/visualizations/2017/comm/voting-rates-race-hispanic.html 18

U.S. Census Bureau, *Voting Rates by Age*, https://www.census.gov/library/visualizations/2017/comm/voting-rates-age.html 19

U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html 20

U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-201* (July 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf 14,19

Miscellaneous Authorities **Page(s)**

U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey, 2016 Comprehensive Report* (2016), https://www.eac.gov/research-and-data/election-administration-voting-survey/ 2,11,14

U.S. Government Accountability Office, *Issues Related to Registering Voters and Administering Elections* (GAO-16-630 June 2016), http://www.gao.gov/products/GAO-16-630 ..... passim

INTEREST OF AMICI CURIAE

Like Ohio, amici States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maryland, New Mexico, Oregon, and Washington, and the District of Columbia are responsible for maintaining accurate and up-to-date statewide voter registration rolls in a manner consistent with the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA). These federal statutes were enacted to ensure that the States administer the voter-registration process for federal elections in a manner that "enhances the participation of eligible citizens as voters," rather than serving as a barrier to voting. 52 U.S.C. § 20501(b)(2). In particular, Section 8 of the NVRA, while recognizing that States should remove ineligible persons from the voter rolls, prohibits any maintenance procedure that "result[s] in the removal . . . of any person from the official list of voters registered to vote . . . by reason of the person's failure to vote." *Id.* § 20507(b)(2).

Contrary to Section 8 of the NVRA, Ohio's "Supplemental Process" subjects a registered voter to a procedure that results in his removal from the voter rolls based solely on his failure to vote during a two-year period—which would cover only a single federal election—unless he takes affirmative steps to retain his registration. Ohio's justification for the Supplemental Process is that a registrant's failure to vote provides reliable evidence that the registrant has moved away from a jurisdiction, rendering him ineligible to vote there. But amici States have declined to rely on such an inference, or have repealed statutes similar to Ohio's since the NVRA's passage, and for good reason: in amici States' experience, voter

inactivity during a single two-year period is a poor proxy for changed residence because large numbers of citizens decline to vote for reasons having nothing to do with moving away.[1]

Amici States submit this brief to explain, on the basis of their experience, that States have a broad array of other, better tools to identify voters who have changed residence. In light of these other available options, reliance on voter inactivity during only a two-year period to target registrants for potential removal poses unacceptable risks of disenfranchising eligible voters and thus undermines rather than enhances the accuracy of voter registration rolls.

STATEMENT

Every State except North Dakota requires citizens to register before voting.[2] States typically require citizens to identify themselves and their residence and to establish their eligibility before adding them to voter registration rolls.[3] On the day of an election, local elections officials use registration rolls to ensure

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[1] Ohio has wrongly suggested (Pet. 17-18) that Hawai'i and Illinois use voter inactivity as a basis to purge voters from the rolls. To comply with the NVRA, Hawai'i no longer enforces its pre-NVRA statute on inactivity, Haw. Rev. Stat. § 11-17. And Illinois's statutory provisions have been superseded by court orders, *see, e.g.*, *Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995), as recognized in state administrative regulations, 26 Ill. Admin. Code § 216.50.

[2] *See* U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey, 2016 Comprehensive Report* 6 (2016) (internet). (For authorities available on the internet, URLs are listed in the table of contents.)

[3] *See, e.g.*, N.Y. Elec. Law §§ 5-102, 5-104; Cal. Elec. Code § 2102.

that each voter is eligible, is voting in the correct district, and has not already voted.

Registration serves important state interests by providing a mechanism for States to ensure that each ballot is cast by an eligible voter in the correct voting district. *See* S. Rep. No. 103-6, at 18 (1993). But registration requirements have also been used in the past to impose burdens that prevent or deter eligible voters from casting a ballot. Congress enacted the federal statutes at issue in this case—the NVRA and HAVA—to prevent registration requirements from being barriers to voting, to simplify registration procedures, and to make registration more easily accessible so that all eligible voters have the opportunity to vote. In conjunction with these federal statutes, many States have pursued additional important reforms to ensure that their registration practices promote rather than impair the ability of eligible voters to cast a ballot.

A. Historical Registration Practices

When Congress enacted the NVRA, it recounted the long post–Civil War history of the States' use of cumbersome registration procedures to reduce the number of former slaves and new immigrants who could successfully register to vote. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (1993). For example, between 1890 and 1910, local registrars in South Carolina purged voters who changed their residence in an effort to deregister seasonal black farmers. And in Louisiana, voters were required to periodically reregister, a burdensome requirement that in practice drastically reduced African-American registration. *See* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United*

States, 9 Yale L. & Pol'y Rev. 370, 373, 377-78 (1991); S. Rep. No. 103-6, at 3 (discussing "annual registration" requirements).

States persisted in these efforts through the first half of the twentieth century. For example, states lengthened residency requirements for registration, required periodic registration at specified locations during work hours, demanded detailed information from applicants for registration, gave elections officials vast discretion to purge voter rolls of persons they found ineligible, and permitted widespread challenges to voters at the polls. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 William & Mary Bill of Rights J. 453, 459-60 (2008); R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 Stan. L. & Pol'y Rev. 382, 387 (2007).

Congress recognized that these obstacles to registration contributed to declining turnout, particularly from minority and poor voters. Overall turnout in presidential elections in the South fell to 19% in 1924, with the black vote falling from 44% to essentially nil. *See* H.R. Rep. No. 103-9, at 2. As late as 1964, registration rates among African-American voters in the States that had adopted such practices remained very low: 19% were registered in Alabama, 32% in Louisiana, and 6% percent in Mississippi—roughly 50 percentage points below the figures for white voters. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2619, 2624-25 (2013).

B. Federal Regulation of State Voter-Registration Procedures for Federal Elections

1. The National Voter Registration Act

Congress initially responded to discriminatory voting practices by passing the Voting Rights Act of 1965, which abolished practices, standards, and procedures that denied the right to vote on the basis of race or color. *See, e.g.*, 52 U.S.C. § 10301. Although the Voting Rights Act "wrought dramatic changes," it failed to eliminate "all vestiges of discrimination against the exercise of the franchise by minority citizens," including abuses of registration procedures. *Shelby County*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting). For example, in 1966, Texas amended its constitution and statutes to require voters to reregister every year, purportedly to prevent election fraud. *See Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 683 (S.D. Texas 2017).[4] The Voting Rights Act also did not halt the national decline in voter turnout in federal elections, which reached its lowest point in forty years for a presidential election in 1988, when only half the voting-age population cast a ballot.[5]

In 1993, Congress enacted the National Voter Registration Act (NVRA) to address the "unfinished business of registration reform" begun with the Voting

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[4] That annual-registration requirement was ultimately struck down as unconstitutional in 1971. *See Beare v. Smith*, 321 F. Supp. 1100, 1107-09 (S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974).

[5] *See* Congressional Research Serv., *The National Voter Registration Act of 1993: History, Implementation, and Effects* 2 (Sept. 2013) (internet).

Rights Act. H.R. Rep. No. 103-9, at 3. Congress understood that cumbersome or inconvenient registration procedures were preventing eligible voters in general from registering to vote and thus depressing turnout for federal elections across all populations. Congress further recognized that "[t]hroughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote," including through "annual registration, selective purging of the voter rolls, literacy tests and poll taxes." S. Rep. No. 103-6, at 3; *see also* H.R. Rep. No. 103-9, at 4 ("registration procedures in the United States were not uniform, were not nondiscriminatory and, in some cases, were interpreted in such a manner as to deny eligible citizens their right to vote"). Congress found that such "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and can "disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). Such practices are inconsistent with the "duty of the Federal, State, and local governments to promote the exercise" of the "fundamental right" to vote. *Id.* § 20501(a)(1)-(2).

To protect that fundamental right, the NVRA required States to comply with two categories of registration reforms that together would reduce obstacles to voting in federal elections to "the absolute minimum." *See* H.R. Rep. No. 103-9, at 3.

First, Congress sought to improve the ways in which eligible voters could register to vote in federal elections. The NVRA "requir[ed] States to provide simplified systems for registering to vote," *Young v. Fordice*, 520 U.S. 273, 275 (1997), by mandating that States permit citizens to register (or to update their

registration) to vote in federal elections through at least five different means:

(1) at the state department of motor vehicles when they apply for a driver's license;

(2) through the mail;

(3) at all offices for state public assistance;

(4) at all offices for disability assistance; and

(5) at other registration agencies designated by the States, such as libraries and public schools.

See 52 U.S.C. §§ 20503-20506.

Second, in order to "prevent the discriminatory nature of periodic voter purges," S. Rep. No. 103-6, at 20, Congress narrowed the procedures that States could use to remove voters from the rolls for federal elections. As an initial matter, Congress hoped that improved procedures for registering voters and updating voter information would "minimize the necessity for periodic, large scale purges" and perhaps even render such purges "superfluous." *Id.* at 16, 18. But to the extent that such purges continued to occur, Congress intended that special care be taken to update the lists in a fair and transparent manner, *see* H.R. Rep. No. 103, at 15-16, and that such methods "be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register," S. Rep. No. 103-6, at 18.

To address these concerns, Congress limited "when, and how, States may remove people" from the voting rolls. *Young*, 520 U.S. at 276. States are barred from removing registered voters from their rolls

except for certain carefully defined reasons—including, as relevant here, in response to "a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). State procedures for deregistering voters based on change of residence must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *Id.* § 20507(b)(1). Any removal must be complete at least ninety days before the election. *See id.* § 20507(a)(3)-(4), (c)(2)(A). And removal based on change of residence may not take place unless (1) the registrant confirms his move in writing, or (2) the State satisfies a two-step confirmation procedure under which the registrant *both* fails to respond to a confirmation notice *and* does not vote within the next two general federal elections. *See id.* § 20507(d)(1).

Congress did not set forth an exhaustive list of ways that a State may determine whether a voter has moved outside a registration district, but it addressed the subject twice. First, Congress specifically provided that a State may use the appearance of a registrant's name in the U.S. Postal Service's National Change of Address (NCOA) database as a basis to "identify registrants whose addresses may have changed." *Id.* § 20507(c)(1)(A); *see* H.R. Rep. No. 103-9, at 15. A State could thus remove such a registrant after following the two-step confirmation procedure in § 20507(d)(1)(B).

Second, Congress specifically rejected the States' prior use of voter inactivity to identify registrants for purging. Before the NVRA's passage, most States and the District of Columbia used failure to vote as a criterion for deregistering voters. *See* Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-

C.L. L. Rev. 483, 499 (1988); *see also* Pet. Br. 4. Congress acknowledged that many States used "non-voting merely as an inexpensive method for eliminating persons believed to have moved," S. Rep. No. 103-6, at 17, but it recognized that many nonvoters may not have moved at all and concluded that they should stay registered "[s]o long as they remain eligible to vote in their current jurisdiction." *Id.* at 2. *See* H.R. Rep. No. 103-9, at 18. The NVRA accordingly provided that the States' roll-maintenance procedures cannot "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2); *see* NVRA, Pub. L. 103-31, § 8(b)(2), 107 Stat. 77, 83 (1993). The purpose of this provision was to ensure that nonvoters would not be required to re-register "except upon a change of voting address to one outside their current registration jurisdiction." S. Rep. No. 103-6, at 2.

2. The Help America Vote Act

A decade later, Congress considered the need for further improvements to voter registration and enacted the Help America Vote Act (HAVA) of 2002. *See* H.R. Rep. No. 107-329, pt. 1, at 31 (2001). HAVA made two overarching changes relevant to this case.

First, Congress required that each State implement a centralized, electronic registration roll that would be maintained and administered "at the State level" and would contain registration information for every registered voter. *See* 52 U.S.C. § 21083(a)(1)(A). This roll must serve as the "single system for storing and managing" each State's registration roll, must be updated on an expedited basis by local officials, and must be "coordinated with

other agency databases within the State." *See id.* § 21083(a)(1)(A)(i), (iv), (vi).

Second, States must take steps to ensure that registration records are accurate, including by making "a reasonable effort to remove registrants who are ineligible to vote." *Id.* § 21083(a)(4)(A). But any such removal efforts must still be done in accordance with the NVRA. *Id.* § 21083(a)(2)(A)(i). In particular, Congress reiterated its 1993 dictate that "no registrant may be removed solely by reason of a failure to vote." *Id.* § 21083(a)(4)(A).

C. State Reforms to Voter Registration

In parallel with these federal reforms, States have undertaken their own efforts to improve registration procedures and expand access to the polls. In particular, the "concern that registration procedures were depressing turnout—and therefore ran counter to the new spirit of voting laws in general—led many states in the 1970s and 1980s to streamline their registration procedures."[6] "Some permitted registration by mail; others allowed voters to register at a wide variety of public offices; a few even allowed voters to register on election day."[7]

Even after the passage of the NVRA and HAVA, States continue to pursue diverse ways to eliminate any barriers that registration requirements might otherwise pose. The majority of States now offer online

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[6] Alexander Keyssar, *The Right to Vote* 254 (rev. ed. 2009).

[7] *Id.*

voter registration.[8] When voters move, many of these States offer easy-to-use, online tools that allow voters to check their registration status and update their address information.[9] Ten States and the District of Columbia provide for "automatic" voter registration by which eligible citizens who have used the services of designated offices are automatically registered to vote without needing to complete an additional application.[10] And States have incorporated a number of protections in their deregistration procedures to ensure that they do not mistakenly remove eligible voters. See *infra* at 22-28.

SUMMARY OF ARGUMENT

Voter inactivity is a poor measure to identify ineligible voters. Ohio presumes that a registrant who has failed to vote in a single federal election has likely moved outside his registration jurisdiction. But in any particular election, many people decline to vote for reasons having nothing to do with changing their residence. And voter turnout among particular demographic groups—including racial minorities, young voters, poor voters, uneducated voters, and voters with disabilities—historically has been even more depressed than in the general population. Targeting nonvoters for a State's deregistration process thus threatens to disenfranchise many eligible voters,

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[8] *See* U.S. Election Assistance Comm'n, *supra*, at 50-51; *see also id.* at 6, 41.

[9] *See, e.g.*, California Sec'y of State, *My Voter Status* (internet); California Sec'y of State, *California Online Voter Registration* (internet).

[10] See Brennan Ctr. for Justice, *Automatic Voter Registration* (internet).

particularly in populations with lower rates of voter turnout.

There is no pressing need for States to target nonvoters. In amici States' experience, there are far better sources of readily available evidence that a voter has moved than the mere fact that a person did not vote. States may use change-of-address information from the U.S. Postal Service, as specifically approved by Congress, 52 U.S.C. § 20507(c)(1)(A), or they may track mail that is returned as undeliverable, including sample ballots or other election-related mailings. They may reconcile the information on their voter registration rolls with other, potentially more up-to-date public or private sources of information. They may offer voters online tools to inform elections officials of changes of address. And they may cooperate with other States to share information so that they can be reliably informed when one of their residents moves to another State.

Relying on voter inactivity rather than these other, more direct sources of information about likely change of residence creates a substantial and unnecessary risk that eligible voters will be removed from the rolls—a risk that is not adequately cured by a State's use of the NVRA's confirmation procedure. Such erroneous removals seriously injure voters by preventing them from exercising their fundamental right to vote. In addition, these errors impose substantial costs on local and state elections officials who must correct these errors and handle complaints from surprised and irate voters who discover—often for the first time on election day—that their registrations were canceled. By contrast, keeping inactive voters on the registration rolls imposes relatively fewer harms because in our experience few if any inactive voters

who have actually moved away nonetheless vote at their old addresses.

ARGUMENT

I. Voter Inactivity Is a Poor Proxy for Identifying Voters Who Have Changed Their Residence.

Ohio and its amici justify the Supplemental Process as an appropriate method of purging voters who have likely become ineligible due to changed residence, on the ground that a lack of voter activity is a reliable indicator that a voter "may have moved." Pet. Br. 10; *see* U.S. Br. 12-13; Georgia et al. Amicus Br. 2-3, 5. But voter inactivity is a poor measure for identifying voters who have left a jurisdiction. Many people decide not to vote for reasons that have nothing to do with changing their residence. And because certain groups of voters—including racial minorities and the poor—have historically had lower voter turnout than the general population for reasons having nothing to do with changes of residence, Ohio's Supplemental Process will disproportionately affect the very voters whom the NVRA was designed to protect. While reliance on voter inactivity may thus, "in a crude way, exclude nonresidents" from remaining on registration rolls, it will "also exclude[] many residents" who are still eligible to vote but have not exercised that right, *Dunn v. Blumstein*, 405 U.S. 330, 351 (1972) (using similar reasoning to invalidate a durational-residence requirement for voter registration as excluding too many otherwise qualified voters).

A. Many Eligible Voters Do Not Vote for Reasons Having Nothing to Do with Changing Residence.

In 2016, "millions of Americans from all walks of life took part in a time-honored national tradition: They did not vote."[11] A staggering 37% of eligible voters—82 million people—chose not to vote in the 2016 presidential election,[12] and up to about 40% have made the same choice in presidential elections going back to 1980.[13] Voter turnout is even lower for midterm congressional elections: in 2014, for example, 60% of eligible voters nationwide did not vote.[14]

There are many reasons that otherwise eligible voters may sit out an election. *See Michigan State UAW Cmty. Action Program Council (CAP) v. Austin*, 387 Mich. 506, 515 (1972). Practical obstacles may prevent people from voting: for example, many voters may be too busy, may fall ill on election day, or may have difficulty finding transportation to the polls.[15]

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[11] Campbell Robertson, *Millions on Election Day Make a Different Decision: Not Voting*, N.Y. Times, Nov. 8, 2016 (internet).

[12] *See* U.S. Election Assistance Comm'n, *supra*, at i, 5, 21 tbl. 1.

[13] *See, e.g.*, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (internet); U.S. Government Accountability Office (GAO), *Issues Related to Registering Voters and Administering Elections* 12 (GAO-16-630 June 2016) (internet).

[14] *See* U.S. Census Bureau, *Voting Hot Report* (internet); U.S. GAO, *supra*, at 12; U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-201*, at 3 tbl. 1 (July 2015) (internet).

[15] *See* Caltech/MIT Voting Tech. Project, *Voting: What Is, What Could Be* 13 (July 2001) (internet); National Comm'n on

Other citizens "are simply not interested in politics,"[16] or may be disenchanted by a particular election and decline to participate out of protest, *see Austin*, 387 Mich. at 388.[17] None of these reasons have anything to do with moving out of a jurisdiction and thereby losing eligibility to vote in that jurisdiction.

In contrast to the large numbers of citizens who do not vote, only a smaller number of residents move. Approximately 12% of Americans change residences every year.[18] And a much smaller number—about 4%—move out of their registration jurisdictions and would thus become ineligible to vote there.[19] Given this striking disparity between the large numbers of Americans who do not vote and the much smaller numbers who move in a way that affects their eligibility to vote, it makes little sense to view voter inactivity as a particularly probative measure of change of residence.

Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 39 (Aug. 2001) (internet) (polling top ten reasons for nonvoting).

[16] Caltech/MIT Voting Tech. Project, *supra*, at 13.

[17] *See, e.g.*, Robertson, *supra* (describing one voter who could not "in good conscience vote" because she viewed Donald Trump as "despicable" and Hillary Clinton as "untrustworthy").

[18] *See* U.S. Census Bureau, *CPS Historical Migration/ Geographic Mobility Tables*, tbl. A-1, rows 91-97, col. D (Nov. 2016) (internet).

[19] *See id.*, tbl. A-1, rows 91-97, col. G. Where a voter has moved *within* the same jurisdiction and has not informed elections officials of his or her new address, the NVRA contains fail-safe provisions that permit the voter to correct the voting records on election day and to cast a ballot. 52 U.S.C. § 20507(e).

Ohio's Supplemental Process is especially problematic because it targets voters who do not vote in only a two-year period, which would cover a single federal election. Unlike other States that consider much longer periods of inactivity, *see, e.g.*, Or. Admin. R. 165-005-0180 (ten years);[20] 25 Pa. Cons. Stat. § 1901(b)(3) (five years), Ohio thus presumes that a voter who sits out just one federal election—for example, because he or she only votes in presidential elections—has moved away and is no longer eligible to vote.

Such a presumption finds no support in the NVRA, contrary to the claims of Ohio and its amici (*e.g.*, Pet. Br. 24; U.S. Br. 31-32). The NVRA uses inactivity as part of its process for *confirming* that a voter has in fact moved away from a district. *See* 52 U.S.C. § 20507(d)(1). As respondents have correctly noted (Resp. Br. 38-41), a confirmation process by definition seeks to "verify[] or corroborat[e]" other evidence, *Black's Law Dictionary* 362 (10th ed. 2014)—in this context, reliable affirmative evidence that a voter has changed residence. Such evidence might include a

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[20] Contrary to respondents' suggestion (Resp. Br. 15-16 & n.8), Oregon's scheme is distinct from Ohio's in several ways. As noted, the Oregon Secretary of State has adopted an administrative rule requiring at least ten years without voting (and absence of any other registration update) before a voter's registration can be made inactive under Oregon Revised Statute § 247.013. *See* Or. Admin R. § 165-005-0180. Moreover, Oregon links driver license information with voter registration information. *See* Or. Rev. Stat. § 247.017. Because driver licenses must be renewed every eight years, Or. Rev. Stat. § 807.130, a voter who has neither voted nor updated his registration information for ten years has likely allowed his Oregon driver license to lapse as well, providing a second indication that the voter has moved.

change-of-address request submitted by the voter himself to the Postal Service; updated address information submitted by the voter to other local or state agencies; or a voter's application to register to vote in another State. *See* 52 U.S.C. § 20507(c). See *infra* at 22-28.

Absent such evidence, voter inactivity alone is not a reliable indicator of change of residence. And a voter's mere failure to respond to a confirmation notice is also not sufficient evidence that he has moved. As with voter inactivity, there are many reasons other than change of residence that would lead voters not to respond to a notice: they may not have received the notice; they may not give a single mailed notice sufficient attention, particularly in an era when people are more accustomed to communicating electronically rather than on paper; or they may not be accustomed to responding to government requests for information.[21]

There is an important difference between using voter inactivity to confirm affirmative evidence of change of residence, as provided by the NVRA, and using voter activity to commence the process of deregistering, as provided by Ohio law. When a voter has taken affirmative steps to inform state or local officials that he has moved, a long period of nonvoting—such as the two federal election cycles in

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[21] *See* Cunningham, *supra*, at 393 (observing that "a major contributor to low response rates in minority communities may be ineffective mail delivery"); U.S. Census Bureau, *An Examination of Self-Response for Hard-to-Interview Groups When Offered an Internet Reporting Option for the American Community Survey* 1, 3-4 (Sept. 4, 2015) (internet) (noting that young people, poor people, and those with less educational attainment are less likely to respond to mail).

the NVRA's confirmation process—provides useful corroboration that the voter has followed through with and adhered to his representation. By contrast, when there has been no such affirmative evidence and deregistration rests entirely on inaction—i.e., failure to vote and failure to respond to a notice—the risk is much greater that an eligible voter will be mistakenly targeted for purging, upsetting the careful balance struck by Congress in the NVRA.

B. A Deregistration Process Triggered by Failure to Vote Will Mistakenly Exclude Certain Voters—Including Racial Minorities, the Poor, and the Disabled—at Disproportionate Rates.

Voter inactivity is a particularly poor proxy for change of residence for certain identifiable demographic groups that historically have had even lower voter turnout than the general population for reasons having nothing to do with those groups' moving patterns.

1. The Census Bureau reports that voting rates in presidential elections have varied widely by race and Hispanic origin.[22] White voters have cast ballots at higher rates than African-Americans and Hispanics in nearly every presidential election since 1968.[23] In

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[22] *See* U.S. Census Bureau, *Voting Hot Report*, *supra*; U.S. Census Bureau, *Voting in America*, *supra*.

[23] *See* U.S. Census Bureau, *Blacks Voted at a Higher Rate than Whites in 2012 Election—A First, Census Bureau Reports* (May 8, 2013) ("*Blacks Voted at a Higher Rate*") (internet); U.S. Census Bureau, *Voting Rate by Race and Hispanic Origin* (May 2017) (internet).

congressional elections too, voting rates for African-Americans and Hispanics have trailed rates for whites for many decades.[24]

Young people also vote at disproportionately lower rates.[25] Indeed, in every presidential election since 1964, 18-to-24-year-olds voted at lower rates than other age groups. By comparison, those 65 or older voted at higher rates than all other age groups since 1996, often 20 to 30 percentage points higher than the youngest voters.[26] And these disparities can be even greater in congressional elections.[27]

Poorer people are also less likely to vote. *See* Tokaji, *supra*, at 496; *see id.* at 483. In 2014, for example, the turnout rate for those with an annual family income of $100,000 or greater was as high as 56%, but the rate for those making less than $30,000 was only 31%.[28] Relatedly, Americans who are

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[24] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 4.

[25] U.S. Census Bureau, *Census Bureau Reports Congressional Voting Turnout Is at Lowest Mark Since 1978* (July 2015) (internet); *see also, e.g.*, U.S. Census Bureau, *Voting in America*, *supra*, at fig. 4; U.S. Census Bureau, *Blacks Voted at a Higher Rate*, *supra*.

[26] U.S. Census Bureau, *Census Bureau Statistics Explore Voting Patterns of Young Adults* (April 2014) (internet); Commission on Fed. Election Reform, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* 42 (Sept. 2005); U.S. GAO, *supra*, at 66; U.S. Census Bureau, *Voting Rates by Age* (internet).

[27] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 5; U.S. GAO, *supra*, at 66.

[28] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 7 tbl. 2.

unemployed consistently turn out at lower rates than those who maintain employment.[29]

Likewise, voting rates increase with education.[30] For example, in presidential elections, turnout for those with a college degree reaches approximately 80%; for those with a high school diploma, it has been approximately 60%; and for those without a diploma, it has been approximately 40%.[31]

Finally, individuals with disabilities have historically voted at lower rates than those without disabilities.[32] In 2000, for example, 42% of eligible individuals with disabilities voted, compared with 52% of those without. More than one decade later, in both 2012 and 2016, approximately 56% of eligible individuals with disabilities voted, compared with approximately 63% without.[33]

2. There are many reasons that these groups have historically had lower rates of voter turnout than the

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[29] *See* U.S. Census Bureau, *Percent Voted by Labor Force Status: Congressional Elections* (internet); U.S. Census Bureau, *Percent Voting by Labor Force Status: Presidential Elections* (internet); U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, at tbl. 6 (internet).

[30] U.S. Census Bureau, *Voting Hot Report*, *supra*; *see also* U.S. Census Bureau, *Percent Voted by Educational Attainment* (internet); Jan E. Leighley & Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* 27, 45-46, 66 (2014).

[31] *See* U.S. GAO, *supra*, at 68.

[32] The Pew Charitable Trusts, *National Disability Voter Registration Week Promotes Election Access* (internet).

[33] *Id.*; *see* U.S. Census Bureau, *Voting and Registration in 2016*, *supra*, at tbl. 6.

general population. The critical point is that most of these reasons have nothing to do with higher rates of changes of residence. For example, younger voters may have lower rates of civic engagement and political mobilization.[34] Less educated voters may be uninterested in politics and unequipped to navigate legal requirements or information costs of learning about issues.[35] Poor voters may have less time to devote to political matters and less resources for accessing the polls due to less flexible job schedules and fewer options for transportation.[36] Disabled voters may be deterred from casting a ballot by inaccessible voting locations, inconvenient voting technology, and insufficiently trained officials.[37] And there are significant racial, age, and other disparities in the distribution of various forms of identification that many States now require voters to bring to the polls.[38] These additional reasons for depressed turnout further undermine the validity of inferring change of residence from the mere fact that a person has failed to vote.

These disparities in voter turnout also make reliance on voter inactivity inconsistent with one of the underlying purposes of the NVRA. Because voter turnout is persistently lower for certain identifiable groups, a purging process that is targeted at nonvoters is likely to focus a State's deregistration efforts on

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[34] *See* Leighley & Nagler, *supra*, at 32-33, 72-76.

[35] *See id.* at 25, 58-59.

[36] *See id.* at 6, 59.

[37] *See* Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 Stan. L. Rev. 1491, 1497-98 (2016).

[38] *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 659-60 (2007).

those groups—which include populations that have historically faced burdens on their right to vote. But Congress enacted the NVRA in part to increase turnout among such voters and to avoid purges targeted at them. The NVRA was a direct response to historical "attempts to keep certain groups of citizens from registering to vote" by imposing burdensome registration requirements on them and targeting them with selective purging efforts. *See* S. Rep. No. 103-6, at 3. And in particular, Congress recognized that purging practices based on nonvoting "tend[] to disproportionately affect persons of low incomes, and blacks and other minorities." *Id.* at 17-18. Targeting nonvoters for deregistration, as Ohio's Supplemental Process does, thus undermines the NVRA's purpose of expanding registration opportunities and limiting purging efforts that disproportionately affect certain groups.

C. States Can Rely on More Direct and Reliable Evidence to Identify Voters Who Have Moved Away.

There is no pressing reason for States to use voter inactivity as a trigger for deregistration in light of a broad array of better methods that they may employ to identify voters who have in fact changed their residence.

1. States can and do avail themselves of various sources of *direct* evidence that a voter has moved to a different jurisdiction. The NVRA identifies one such source of evidence that Ohio and many other States use: change-of-address information that individuals submit to the Post Office and that become part of the NCOA Database. See *supra* at 8. Congress has "strongly encourage[d] all States to implement the

NCOA program," S. Rep. No. 103-6, at 19, which is "the most efficient and cost-effective method of keeping registration lists up-to-date," H.R. Rep. No. 103-9, at 5.

The NCOA Database is not the exclusive source of direct affirmative evidence that a voter has moved. Many States, including Ohio (Pet. Br. 57), regularly engage in broad-based, statewide mailings to potential voters.[39] Such mail is useful to "communicate basic procedural information (such as when an election is taking place and how a person may register or vote), or more detailed information about races and measures on the ballot."[40]

But States can also use these communications to determine whether a voter has changed residence. Specifically, the Postal Service will return mail as undeliverable if it has no record of a person at a particular address. Many States provide for the use of such undeliverable returns as reliable evidence that a voter no longer lives at the address in the registration rolls.[41] Ohio does not similarly use evidence that its

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[39] *See, e.g.*, Ala. Code § 17-4-30(a) (requiring nonforwardable mailings to every registered voter every four years to identify changes-of-address); Cal. Elec. Code §§ 2220, 2223 (permitting county elections officials to send address confirmation postcards or sample ballots); N.Y. Elec. Law § 4-117 (requiring nonforwardable mailings about upcoming elections, ballot issues, and polling places); R.I. Gen. Laws § 17-5-3 (requiring mailings of ballot questions to "each residential unit").

[40] U.S. GAO, *supra*, at 74.

[41] *See, e.g.*, Ala. Code § 17-4-30; Ariz. Rev. Stat. § 16-166(A); Ark. Const. amend. 51, §§ 10(f), 11(g); Cal. Elec. Code § 2226; Colo. Rev. Stat. § 1-2-605(1), (5); Conn. Gen. Stat. §§ 9-32, 9-35(e); Neb. Rev. Stat. § 32-329(2); N.M. Stat. Ann. § 1-4-28(B); N.Y.

mailings are undeliverable as an indicator that a voter has changed residence.[42]

2. States may also improve the accuracy of their voter rolls by comparing their registration information with information from other databases. States can and do reconcile voter-registration information with various sources of government data, including candidate or referendum petitions that list a voter's address,[43] tax records,[44] state census lists,[45] records of newly condemned or razed buildings,[46] and databases from other state agencies such as DMVs.[47] California also permits local elections officials to use information from private credit-reporting agencies to determine if a voter's registration information is up-to-date.[48]

Drawing broadly on these other sources of information is helpful because citizens are often more motivated to provide updated information for

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Elec. Law § 5-712(1); R.I. Gen. Laws § 17-9.1-26(a)(2); Va. Code § 24.2-428.1; Wash. Rev. Code § 29A.08.620(4)(a); *see also* Letter from Scott T. Nago, Chief Election Officer, State of Hawai'i, to T. Christian Herren, Jr., Voting Section Chief, Civil Rights Division, U.S. Department of Justice (July 28, 2017).

[42] Ohio appears to use undeliverable mail solely during its process of verifying new or updated registration information submitted by a voter. *See* Ohio Rev. Code § 3503.19(C)(3).

[43] Va. Code § 24.2-428.1.

[44] 17 Vt. Stat. § 2150(d)(2); *see generally* National Research Council, *Improving State Voter Registration Databases* 9 (2010) (internet).

[45] National Research Council, *supra*, at 9.

[46] Md. Code, Elec. Law §§ 3-502(c), 3-504(b)(2).

[47] *E.g.*, D.C. Mun. Regs. tit. 3, § 519.1; Fla. Stat. § 98.065(4)(a)-(b); Va. Code § 24.2-404(A)(9).

[48] Cal. Elec. Code § 2227.

purposes other than voter registration. In Alaska, for example, officials "sometimes use the Alaska Permanent Fund Division distribution list . . . to obtain current address information" because residents must submit up-to-date information to the Division "to receive a payment from the state's oil savings account earnings."[49] Similarly, citizens are more likely to provide updated address information to state tax authorities both because annual tax filings are mandatory and because many citizens receive tax refunds. These other sources may thus provide more accurate, direct evidence of voter information than the registration rolls themselves.

3. States can also rely on information from other States to share information about where voters may have moved. In Connecticut and Delaware, for instance, elections officials may begin the deregistration process if they learn that a registered voter has registered in another State. *See* Conn. Gen. Stat. § 9-21; Del. Code tit. 15, §§ 1704, 1707; *see also, e.g.*, N.Y. Elec. Law § 5-712(2); 9 N.Y.C.R.R. § 6217.8(d). Similarly, Virginia draws on the Driver's License Compact between States to identify when a voter may have moved out of State. *See* Va. Code § 24.2-427(C).

The enactment of HAVA in 2002 has helped to facilitate such cross-state information sharing. Before HAVA's enactment, local counties were in charge of voter registration lists in most states. Voters who moved between counties, even within the same state, often appeared on two (or more) county registration

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[49] National Research Council, *supra*, at 9.

lists for a considerable time,"[50] and "most of the responsibility was on the voter to inform" local elections officials that the voter had moved.[51] HAVA addressed this problem by requiring States to establish centralized, computerized registration lists "in such a manner that it will be possible at some point in the future for states to share data between them for the appropriate additions and removal of voters from their rolls." H.R. Rep. No. 107-329, pt. 1, at 36. And many States have supplemented these centralized registration lists by developing easier ways for voters to check their registration status online and electronically update their address information. See *supra* at 9-11.

The statewide, electronic voter registration rolls that HAVA required have enabled States to undertake more ambitious and comprehensive efforts to share voter information and thereby track changes of residence that affect voter eligibility.[52] For example, twenty States (including Ohio) and the District of Columbia currently participate in the Electronic Registration Information Center (ERIC), which provides a mechanism for member States to compare

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[50] *See* Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 23 (Jan. 2014) (internet); *see id.* at 28.

[51] Orange County (Calif.) Registrar of Voters, *Voter Registration Accuracy and Voter List Maintenance* 3 (2012) (internet).

[52] *See* National Research Council, *supra*, at 28; Presidential Comm'n on Election Admin, *The American Voting Experience, supra*, at 28-29; *see also, e.g.*, Conn. Gen. Stat. § 9-50c(a); Va. Code §§ 24.2-404(A)(10), 24.2-427(B); Wash. Rev. Code § 29A.08.135.

their voter registration data with similar data from other States.[53]

States have also entered into smaller regional information-sharing agreements. For example, in 2008, Oregon and Washington entered into a pilot interstate voter registration database matching project under which a database of 3.4 million Washington voters was matched against a database of 2 million Oregon voters to identify dually registered voters. The success of this project "demonstrated that an interstate matching project can be carried out with relative ease."[54]

Such regional projects may be particularly effective in States with large metropolitan areas that span jurisdictional borders or States with voters who typically relocate in predictable ways.[55] For example, the Cincinnati metropolitan area spans the States of Ohio, Kentucky, and Indiana; the New York metropolitan area spans the States of New York, New Jersey, and Connecticut; and the Washington metropolitan area spans the District of Columbia and the States of Maryland and Virginia. Relocations within those areas are relatively common. In addition, studies have shown that residents of New York typically relocate to New Jersey or California; residents of Ohio often relocate to Michigan and Pennsylvania;

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[53] The Pew Charitable Trusts, *Electronic Registration Information Center* (internet); ERIC, Summary of Membership Guidelines and Procedures (internet); ERIC, *Who We Are* (internet).

[54] R. Michael Alvarez et al., *Interstate Voter Registration Database Matching: the Oregon-Washington 2008 Pilot Project* 9 (Aug. 10, 2009) (internet).

[55] *See, e.g., id.* at 1.

and residents of many States retire to Florida.[56] Cross-state information sharing along these well-established migration paths would improve the States' ability to track the movement of voters.

To be sure, information-sharing between States must be done cautiously to ensure that additional errors are not introduced by this process. For example, a different multistate information-sharing program, the Interstate Voter Registration Crosscheck Program, has been subject to criticism for erroneously identifying voters as illegally voting in multiple jurisdictions.[57] States have a responsibility to ensure that the procedures and practices for these types of projects avoid such errors.

II. Using Voter Inactivity as a Trigger for Deregistration Imposes Substantial Harm While Serving Limited Purposes.

Because voter inactivity is a poor measure to identify voters who have changed their residence, relying on inactivity to focus a State's deregistration efforts threatens harm to eligible voters that is disproportionate to any marginal benefit to the State. In amici States' experience, erroneous purging of eligible voters can cause serious injury to voters by denying them the opportunity to exercise their right to vote, and further imposes serious costs on local and

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[56] U.S. Census Bureau, *State-to-State Migration Flows* (2015) (internet); U.S. GAO, *supra*, at 28.

[57] *See* Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Jan. 13, 2017) (internet) (finding that purging voter rolls using Crosscheck data would risk "eliminat[ing] about 200 registrations used to cast legitimate votes for every one registration used to cast a double vote").

state elections officials who must correct any such errors. These harms cannot be justified by the slim possibility that voter inactivity will accurately identify some number of voters who have moved away—particularly when other, better methods will already have identified most or perhaps all such voters.

1. For years, the most common problems on Election Day have concerned voters who have been erroneously omitted from the registration rolls.[58] "An especially infuriating barrier eligible voters can face is to show up on Election Day, believing (perhaps rightly) that they are qualified to vote, and then be turned away."[59] As the president of the National Association of Secretaries of State recently observed, these registration issues—not voter fraud—are the "biggest problem" facing elections administrators today.[60]

Erroneous deregistration is a serious problem that disenfranchises voters. Many voters do not discover that they have been purged until the day of the election, at which point it may be too late for them to cure the problem. Only a few States provide for same-day registration; in the other States, voters who discover on election day that they have been purged will be unable to cast a ballot in that election. The problem may be worse in primaries, as some States require voters to register with a political party weeks

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[58] Commission on Fed. Election Reform, *Building Confidence*, *supra*, at 9.

[59] National Comm'n on Fed. Election Reform, *To Assure Pride and Confidence*, *supra*, at 34.

[60] The Pew Charitable Trusts, *Election Security in America* (Mar. 8, 2017) (internet).

or months before the primary election. *Cf. Rosario v. Rockefeller*, 410 U.S. 752, 756-61 (1973) (upholding statute requiring primary voters to register in a political party at least 30 days before the *preceding* general election).[61]

Even if a voter promptly learns that he has been purged, the process of reregistering will itself be a burden that some voters may be unwilling or unable to undertake. *See, e.g., Beare*, 321 F. Supp. at 1104-05 (noting that registration practices had been "expensive, cumbersome, and inconvenient"). To this day, a significant number of Americans—one out of every ten adults—consider registration to be difficult, especially young and minority voters who already are less likely to vote. *See* Alvarez, Hall & Llewellyn, *supra*, at 386, 394, 397-403, 406. Moreover, eligible voters who are forced to reregister because of an erroneous removal may be alienated by the process and deterred from further civic engagement. *See* Cunningham, *supra*, at 386 & n.102.

2. Erroneously removing voters from the rolls also imposes costs on state and local elections officials. Mistakenly purging voters "unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again." S. Rep. No. 103-6, at 18. In addition, erroneous deregistration can create confusion and delay at the polls. "Voters whose information is missing from the rolls . . . require the time and attention

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[61] *See also, e.g.*, New York State Att'y Gen., *A Report on Voter Access in the 2016 Presidential Primary* 1 n.3 (Dec. 2016) (internet).

of officials."[62] "Oftentimes poll workers have to contact the local election office for instructions, request additional information from the voter to resolve the discrepancies, require the voter to complete paperwork such as an affidavit or registration application form, or require the voter to vote a provisional ballot."[63] "The result is a bottleneck at the check-in table that will slow the processing of voters and begin to cause backups and lines."[64] These costs can be tremendous and unduly burdensome for both voters and state and local officials. *Cf. Wit v. Berman*, 306 F.3d 1256, 1262 (2d Cir. 2002) (recognizing legitimate state interest in avoiding "chaos" from "massive disputes over registration").

3. The potential harms of using an unreliable metric such as voter inactivity to target voters for deregistration cannot be justified by any corresponding benefit to the States. There is plainly no benefit to *erroneously* removing an otherwise eligible voter from the rolls. Voter inactivity is a much poorer way of identifying changes of residence than other, more direct measures that a voter has moved.. And keeping nonvoters on the rolls imposes relatively few costs on States and leads to few if any cases of voter fraud. Voter fraud of any stripe has been "highly

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[62] *See* Presidential Comm'n on Election Admin, *supra*, at 25.

[63] Republican Nat'l Lawyers Ass'n, *RNLA Response to the Report and Recommendations of the Presidential Commission on Election Administration* 10 (April 2014) (internet).

[64] *Id.*

unusual" in recent years[65]—in New York, for example, the Attorney General received only two complaints of voter fraud during the general federal election last year, and neither was substantiated.[66] And there is even less evidence that voter fraud has been committed by an individual who voted twice because of obsolete registration information that would have been purged under a procedure like Ohio's Supplemental Process. Unsupported or exaggerated fears of voter fraud do not justify the concrete harms that flow from stripping real, eligible citizens of their right to vote.

To be sure, amici States retain an interest in maintaining "accurate and up-to-date voter registration lists," S. Rep. No. 103-6, at 18, even if fraud is unlikely to occur. But the low risk of harm from keeping inactive voters on the rolls, absent better information that they have changed their residence, informs our decisions about what criteria are appropriate for identifying the voters who are the focus of our deregistration efforts. Here, the disproportionate harm threatened by the use of voter inactivity easily outweighs any marginal benefit that this metric might provide as a proxy for change of residence.

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[65] The Pew Charitable Trusts, *Election Security in America*, *supra* (interview with the president of the National Association of Secretaries of State).

[66] *See* Letter from Eric T. Schneiderman to Hon. Elijah E. Cummings et al., dated Feb. 22, 2017, at 1 (internet).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, courts, and state governments on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes.

The integrity of our nation's electoral system has long been one of Public Citizen's central concerns, both as an end in itself and because of its direct impact on Public Citizen's other policy concerns. As a result, Public Citizen's advocacy efforts often focus on legislation affecting the conduct of elections, and Public Citizen has frequently submitted briefs as amicus curiae to this Court in cases presenting election-law issues. *See, e.g.*, *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

Public Citizen also has a longstanding interest in the principles governing interpretation of federal statutes. Application of such principles cuts across the various subject areas of Public Citizen's concern and is often central to the disposition of cases in which the organization is involved. For example, Public Citizen's attorneys were counsel in *Marx v. General Revenue Corp.*, 568 U.S. 371 (2013), which involved the application of the canon that statutes are to be construed

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. General letters of consent to the filing of amicus briefs from counsel for all parties are on file with the Clerk.

to avoid superfluity—a canon invoked, wrongly, in the Brief of the United States supporting petitioners in this case. Public Citizen believes that a short discussion of the flaws in the United States' application of the interpretive methods it invokes to justify its change of position in this case may be of assistance to the Court as it considers the important question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Voter Registration Act of 1993 (NVRA) provides that no state may engage in any program or activity that will "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This prohibition is subject to a single exception: "[N]othing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters" when specified conditions are met. *Id.* Subsections (c) and (d), in turn, provide procedures by which states may confirm information that a registered voter has changed residence to a place outside the jurisdiction in which he or she is registered. Under those procedures, a voter's failure to respond to a notice seeking confirmation of his or her change of address and to vote during the period ending with the second general election after the date of the notice permits removal from the voter rolls.

This case involves Ohio's use of a notice-and-failure-to-respond-or-vote procedure to purge its voter registration lists in the absence of any information

that voters have changed residence. Rather, under Ohio's "supplemental" process for deregistering voters, voters are targeted to receive notices initiating the process solely because of their failure to vote in prior elections. As explained by respondents—organizations and an individual voter who challenge Ohio's actions—the use of failure to vote as a trigger for sending notice and deregistering voters violates the NVRA's prohibition on activities that result in removal of voters for failure to vote. Ohio's method falls outside the NVRA exception because it is not a use of the "procedures described" in subsections (c) and (d) of § 20507 to confirm information that a voter has changed residences.

Although respondents' position coincides with the longstanding view of the United States Department of Justice, the United States has reversed its view since the court of appeals' decision in this case, and now asserts that the Ohio procedure comports with the statute. The newly minted position of the United States rests in significant part on its argument that respondents' reading of the law renders superfluous the exception language in § 20507(b)(2), which was added as a clarification when Congress enacted the Help America Vote Act (HAVA) in 2002. *See* U.S. Br. 23. At the same time, however, the government acknowledges that its new view renders other language of HAVA superfluous. U.S. Br. 26.

The government then invites the Court to apply the canon against superfluity to choose between two competing interpretations that, it says, both fail to account for all of the statutory language. According to the government, the Court should select the reading that avoids what it calls "the more glaring superfluity." U.S. Br. 26 n.8. Its interpretive methods cannot

be squared with this Court's decisions, which have recognized that the canon against superfluity applies only when the litigant who relies on it is able to proffer a construction that gives effect to all the language of a statute—a test the government concedes it cannot meet. *See id.*

The flaws in the government's invocation of the canon do not stop there. The respondents' position does not in fact render any part of § 20507 superfluous. The government's, on the other hand, ignores the plain meaning of express language in each of the relevant subsections of § 20507, fails to address key language in HAVA that expressly negates the government's argument that it narrows or limits the prohibitions of the NVRA, and disregards the interpretive principle that exceptions to remedial statutes should be narrowly construed.

In short, the United States' construction of the statute is untenable.

ARGUMENT

I. The United States' invocation of the canon against surplusage is contrary to fundamental limitations on that doctrine.

The United States' new reading of the NVRA hinges largely on the proposition that, when HAVA added the exception language to § 20507(b)(2), Congress must have "intend[ed] its amendment to have real and substantive effect." U.S. Br. 23 (quoting *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016)). The "real and substantive effect" the government posits is to permit deregistration of voters for failing to vote as well as for changes of residence, as

long as the state employs a notice-and-failure-to-respond-or-vote method to do so. Not reading the exception language in this way, the government argues, creates "glaring superfluity by denying any effect to the provision of HAVA amending Section 20507(b)(2)." *Id.* at 26 n.8.

The government, however, elsewhere seems to acknowledge that its own interpretation renders other language in HAVA superfluous. There, in contrast to its earlier assertion that the language it favors must be given real and substantive effect to avoid superfluity, it pivots to relying on the proposition that "[t]his Court's 'preference for avoiding surplusage constructions is not absolute'" and does not prevail over other expressions of plain congressional intent. *Id.* at 26 (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)). In addition, the government points to its claim of superfluity in § 20507(b)(2) as a reason for disregarding the superfluity problem created by its own position, and it observes that "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Id.* at 26 n.8 (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted)).

The government's quotations are accurate, but also devastating to its position. The problem is not just the government's opportunistic approach of invoking the canon when it appears favorable to the government's new reading of the statute and denigrating it when it cuts against the government's argument. The more fundamental difficulty is that the government's invitation to choose what it considers the less "glaring" superfluity runs counter to the Court's recent reminders that the canon against construing statutes to

avoid rendering words and phrases superfluous does not work that way.

Rather, the Court has emphasized that because statutory drafting not infrequently involves some redundancy and surplusage, *see, e.g.*, *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), the canon against superfluity "is not an absolute rule," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). Thus, the Court has repeatedly held that "the canon against surplusage 'assists *only* where a competing interpretation gives effect to every clause and word of a statute.'" *Id.* (quoting *Microsoft v. i4i*, 564 U.S. at 106) (emphasis added); *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 & n.48 (2011); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). The canon does not strongly favor one interpretation over another where "no interpretation ... gives effect to every word," *Marx*, 568 U.S. at 385, or where a proffered statutory construction gives meaning to one passage "only at the expense of rendering the remainder ... superfluous." *Bruesewitz*, 562 U.S. at 236.

Even by the government's own account, its reading does not give effect to every word of the interlocking provisions at issue. Its reliance on the canon of avoiding surplusage is therefore unavailing.

II. The United States' new reading of the NVRA is not needed to avoid rendering § 20507(b)(2)'s exception superfluous.

The errors in the government's construction of the NVRA run deeper than the flaw in its understanding of the canon against superfluity. The government's assertion that the respondents' construction fails to give

meaning to the exception language in § 20507(b)(2) is itself fundamentally wrong—indeed, incoherent. Moreover, that position fails to account for critical language in § 20507(b)(2), in § 20507(d), and in HAVA, and thus violates the United States' own caution against reliance on canons of construction that require "departing from the 'plain meaning' of the statutory text." U.S. Br. 26 (citing *Lamie*, 540 U.S. at 536).

A. Respondents' reading of the statute gives full effect to all its provisions.

The assertion that respondents' reading of the statute fails to give effect to the exception language in § 20507(b)(2) is hard to credit. The respondents *acknowledge* that the statutory prohibition on state registration maintenance programs that result in de-registration based on a voter's failure to vote does not apply when a state carries out a program that uses the procedures described in subsections (c) and (d) of § 20507 to remove registrants who have "changed residence," 52 U.S.C. § 20507(d). *See* Resp. Br. 36. But a process, like Ohio's, that removes voters, not because there is reason to believe that they have *moved*, but because they have *not voted*, is not a use of "the procedures described in subsections (c) and (d)." The process thus does not fit within the exception language in § 20507(b)(2).

The procedures described in subsection (c) involve the use of change-of-address information from the Postal Service, and Ohio's supplemental process indisputably does not involve the use of such procedures. Subsection (d) likewise authorizes only procedures to remove a registrant "on the ground that the registrant has changed residence," 52 U.S.C. § 20507(d)(1), and provides for notices aimed at "confirm[ing]" whether

the voter's residence has changed. *Id.* §§ 20507(d)(1)(A), (d)(2)(A). A process that is not based on, and does not attempt to confirm, any information as to a voter's change of residence, is not a procedure described in subsection (d).

As this Court has explained, "the canon against surplusage" that the United States invokes here "is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx*, 568 U.S. at 386. But interpreting § 20507(b)(2) to allow the use of the procedures of subsections (c) and (d) to remove voters who have changed residence, but not to allow a notice-and-failure-to-respond-or-vote method of removal that is not tied to a change of residence, gives meaningful effect to each part of the statute: the underlying prohibition on removal for failure to vote, the (b)(2) exception language, and all the language of subsections (c) and (d) that describe the procedures and thus define the scope of the exception. Nothing in the respondents' position renders any part of the statutory scheme superfluous.

B. The United States' assertion that its reading of the NVRA is necessary to give "real and substantive effect" to the (b)(2) exception language is incoherent.

The United States' contrary argument rests significantly on the point that the exception language was added in HAVA nine years after the original enactment of the NVRA. Because removal of registrants in compliance with the subsection (c) and (d) procedures already was permissible under § 20507, the government asserts that the exception language must have "a real and substantive effect" beyond authorizing the use of those procedures to confirm information that

voters have changed residence. *See* U.S. Br. 22–23 (quoting *Husky*, 136 S. Ct. at 1586). Simultaneously, however, the government acknowledges that the language was a "clarifying amendment," *id.* at 19; *see id.* at 23 n.6, and it asserts that the amendment "did not alter the meaning of Section 20507(b)(2)." *Id.* Thus, the government's argument boils down to the paradoxical assertion that the amendment had the "real and substantive effect" of "not alter[ing] the meaning" of the statute.

The government argues that this non-effect was nonetheless "real and substantive" because it "settled a recognized dispute" over whether section 20507(b)(2) prohibits a program like Ohio's under which the removal process is initiated based on failure to vote rather than information indicating that a voter has changed residence. U.S. Br. 23. Even assuming that such a "recognized dispute" existed (*but see* Resp. Br. 50–51), the government's argument begs the question *how* the language settled it. The answer is that, by stating that the exception for a notice-and-failure-to-respond-or-vote method of removal applies only when it is conducted in compliance with the procedures described in subsections (c) and (d), the exception language in fact clarified that programs such as Ohio's are not permissible because they do not use the procedures described in those subsections.

The incoherence of the government's position is heightened by its failure to account for the framing of the language added to § 20507(b)(2) as an *exception* to the otherwise applicable prohibition on state activities that result in deregistration for failure to vote. The United States argues that the use of a notice-and-failure-to-respond-or-vote removal method does not un-

der any circumstances "result in the removal" of a registrant "by reason of the person's failure to vote" within the meaning of § 20507(b)(2). *See* U.S. Br. 15–19. In other words, the government's reading of the statute is that programs like Ohio's would not be prohibited under subsection (b)(2) even *without* the addition of the exception language, and, indeed, even if subsections (c) and (d) did not exist.

Thus, on the government's own reading of the statute, the clarification provided by the exception language was wholly unnecessary and lacked the "real and substantive effect" the government insists it must be given. Even worse for the United States' position, its new reading of the statute cannot explain why Congress would clarify that the permission to use the procedures described in subsections (c) and (d) is an *exception* to the otherwise applicable prohibition on removing registrants for failure to vote. In the government's view, the subsection (c) and (d) procedures are not exceptions to the (b)(2) prohibition because it would not apply to them in any event. Far from giving meaning to the language added by HAVA, the government's view of the statute renders it unnecessary, even nonsensical.

Respondents' position, on the other hand, sensibly accounts for the clarification that the exception language provides: Subsections (c) and (d) create an exception because, but for those provisions, programs that use nonvoting following a notice as a basis for removal as described in subsections (c) and (d) would violate subsection (b)(2)'s prohibition on deregistration for failure to vote. And the exception allowing the use of such methods applies only when they are carried out using the procedures described in subsections (c) and (d).

C. The United States' new reading of the statute ignores HAVA's plain language.

The government's insistence on reading language added by HAVA to support a substantive limit on the application of the subsection (b)(2) prohibition on de-registration because of nonvoting is contrary to the plain language of HAVA—language that the United States does not even mention in its brief. HAVA expressly provides that, with one exception not applicable here (concerning the requirement that certain registrants provide identification the first time they vote), "nothing" in HAVA "may be construed to ... supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

The government makes no attempt to demonstrate that its construction of the exception language added by HAVA complies with the prohibition on reading HAVA to "limit the application" of the NVRA—including, of course, the application of subsection (b)(2).[2] Moreover, the government's admonition that the Court should "presume" that the amendment nonetheless was intended to have such effect overlooks that the presumption that an amendment has "real and substantive effect" is only that: a presumption. *See Husky*, 136 S. Ct. at 1586. When a statute unambiguously disclaims a particular effect, any otherwise applicable presumption that it has that effect cannot control the statute's construction.

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[2] The plain language of HAVA also rules out any suggestion that 52 U.S.C. § 21083(a)(4)(A) limits the prohibition of § 20507(b)(2). To its credit, the government itself appears to acknowledge this point when it describes § 21083(a)(4)(A) as merely "an imprecise reference to the requirements set forth in more detail in Section 20507." U.S. Br. 26.

D. Other principles of statutory interpretation weigh against the United States' new reading of the NVRA.

The United States' new position also overlooks canons of construction that point toward a reading more consistent with both the statutory language and the purposes evident from that language. In particular, the government does not recognize that the permission to engage in the procedures described in subsections (c) and (d) is an exception to the broad and otherwise applicable remedial requirement that states not deregister voters for failure to vote. As this Court has long recognized:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Given the statute's general policy against deregistration for non-voting, the exception to that policy must be "read ... narrowly in order to preserve the operation of the [policy]." *Commissioner v. Clark*, 489 U.S. 726, 739–40 (1989); *accord, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993).

Ultimately, this Court's interpretive task is to "do [its] best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their

place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (citation omitted). Respondents' construction of the NVRA gives effect to all of its provisions, including language that the United States' new reading cannot explain. And it gives effect to the statute's evident purposes, without ascribing a significance to the subsequent enactment of HAVA that Congress explicitly disclaimed. By contrast, the government's shifting and self-contradictory reliance on the canon of avoiding superfluity, in the circumstances here, "does not seem a particularly useful guide to a fair construction of the statute." *Id.*

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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JON HUSTED, Ohio Secretary of State,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR VOTEVETS ACTION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Carrington v. Rash, 380 U.S. 89 (1965) 31
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Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co., 307 F.3d 944, 952 (9th Cir. 2002) 24
Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) 4
Reynolds v. Sims, 377 U.S. 533 (1964) 4
Robbins v. Chamberlain, 297 75 NE. 2d 617 (1947) 20
Wesberry v. Sanders, 376 U.S. 1 (1964) 4

SECONDARY SOURCES

2014 Post-Election Voting Survey of the Active Duty Military Tabulations of Responses, DEF. RESEARCH SURVEY AND STATISTICS CTR. 114 (2015) 13
Adam Skaggs, *Registering Military and Overseas Citizens to Vote*, BRENNAN CENTER FOR JUSTICE (2009) 11, 12
Alexander Keyssar, *The Right to Vote: The Contested History of the United States* (2009) 5
Amy L. Freeman, *How Do You Register to Vote if You're Homeless?*, HUFFINGTON POST (Aug. 26, 2014) 30

Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, REUTERS (June 2, 2016) 25
Bureau of Labor Statistics, *43.3 percent of veterans with a service-connected disability were employed in August 2015* (Nov. 10, 2016) 29
Corey B. Rumann & Florence A. Hamrick, *Student Veterans in Transition: Re-enrolling after War Zone Deployments*, 4 J. OF HIGHER EDUC. 431 (July/Aug. 2010) 22
Critical Issues Facing Veterans and Military Families, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Jan. 20, 2017) 28
Dani Molina & Andrew Morse, *Military-Connected Undergraduates: Exploring Differences Between National Guard, Reserve, Active Duty, and Veterans in Higher Education*, THE AM. COUNCIL ON EDUC. (Nov. 2015) 21
Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, THE ATLANTIC (Jan. 10, 2014) 29
David Thackham, *DOJ wants to know how S.C. purges voters. Here's what the state will say*, THE HERALD (July 2015) 25
Donald S. Inbody, *Should soldiers' votes get counted? That's not as easy as you'd think*, WASH. POST (Nov. 11, 2015) 12
Ellen Brait, *Voting Restrictions in the U.S. Since the Election: State by State*, THE GUARDIAN (Jul. 13, 2015) 29
Housing Assistance Council, *Supporting Veterans in Ohio*, VETERANS DATA CENT 28
John D. Griffin and Brian Newman, *Are Voters Better Represented?*, 67 J.Pol. 1206 (2005) 6
Jon Marcus, *Community Colleges Rarely Graduate the Veterans They Recruit*, THE ATLANTIC (Apr. 21, 2017) 22

Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65 (2012) ... 4
Kim Quaile Hill & Jan E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. OF POL. SCI. 351 (1992) ... 7
Nancy Montgomery, *Troops Turned Out in Smaller Numbers for 2016 Presidential Vote*, STARS AND STRIPES (Aug. 22, 2017) ... 12
R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 FORDHAM URB. L.J. 935 (2007) ... 26
Sean McElwee, *The Income Gap at the Polls*, POLITICO (Jan. 7, 2015) ... 29
Shipping via Military Mail [APO, FPO, DPO], GOVX (2016) ... 24
Study explores reasons why Veterans seek – or don't seek – PTSD care, DEP'T OF VETERANS AFFAIRS (Apr. 24, 2014) ... 27
Sue Doe & Lisa Langstraat, *Generation Vet: Composition, Student Veterans, and the Post-9/11 University* (2014) ... 19
The Federalist No. 10 (James Madison) ... 5
Transition Assistance Program Overview, MILITARY.COM (Sept. 2017) ... 27
U.S. Army, *Army Postal Services* (Oct. 2015) ... 25
U.S. Navy, *Voting Assistance Officers*, Commander, Navy Installation Command (2017) ... 26
V. O. Key, Jr., *Southern Politics in State and Nation* (1949) ... 11
Voter Rights/Registration Packet 2010, NAT'L COAL. FOR THE HOMELESS 8 (2010) ... 30
What do we do with the staggering number of Disabled Veterans?, NAT'L VETERANS FOUND. (Oct. 23, 2015) ... 28

What Statistics Show About Veteran Substance Abuse and Why Proper Treatment is Important, NAT'L VETERANS FOUND. (Mar. 30, 2016) 28
William Walter Franko, *The Policy Consequences of Unequal Participation*, 68 (July 2012)..... 6
Yael Bromberg et al., *Tuning In & Turning Out: Millennials are active but not voting; what's stopping them and how can we make their voices count?*, COMMON CAUSE (2016).....22, 25, 26, 27

STATUTES

Harry W. Colmery Veterans Educational Assistance Act, Pub .L. No. 115-48, 131 Stat. 973 (Aug. 16, 2017)..... 21
Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2012)..... 7, 11
National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (2012).....passim
Ohio Rev. Code Ann. §§ 3511.01–3511.16 (West 2011)..... 15, 19
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The Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C §§ 20301 – 20311 (Supp. III 2012).....passim
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LEGISLATIVE & ADMINISTRATIVE MATERIALS

H.R. Rep. No. 103-66 (1993) 8

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Office of the Ohio Secretary of State, *Bridging the Gap: Simplifying the process for UOCAVA voters through innovative technology and data collection* (2013) 17
S. Rep. No. 103-6 (1993)..... 9
U.S. Dep't of Defense, Federal Voting Assistance Program, *2016 Post-Election Report to Congress* (2017) 13
U.S. Dep't of Veterans Affairs, *Department of Veterans Affairs Education Program Beneficiaries: FY 2000 to FY 2013*, NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS (2017) 20
U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* (2016)..... 12
U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey 2016 Comprehensive Report: A Report to the 115th Congress* (2016)..... 17

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INTEREST OF *AMICUS CURIAE*[1]

VoteVets Action Fund is a nonpartisan nonprofit social welfare organization that advocates on behalf of veterans and their families. Registration and voter advocacy work are integral to VoteVets's mission. VoteVets believes veterans have a unique stake in today's social, economic, and political issues and is committed to amplifying veterans' voices on those issues. Veterans' ability to exercise the right to vote is critical to making their voices heard on these pivotal issues.

SUMMARY OF ARGUMENT

The right to vote and the practical ability to exercise that right are essential to a functional, responsive democracy. Active duty servicemembers and veterans have made significant and unique sacrifices to protect American democracy. Quite often, however, these servicemembers are effectively prevented from exercising the very rights they risk their lives to protect.

Active duty servicemembers and veterans experience uniquely personal consequences from elections. Policy changes affect military salaries and benefits, which then impact the quality and

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

accessibility of healthcare, higher education, housing and post-service employment, as well as other essential benefits for servicemembers and their families. Yet, for all of the sacrifices they make, active duty servicemembers and veterans register to vote and exercise the right to vote for the elected representatives who implement these policies at disproportionately low rates.

The transient nature of the military lifestyle severely complicates servicemembers' ability to participate in this most basic political process. Active duty servicemembers, including those serving in the National Guard or the Reserves, depend on the military postal system. This system uses military-specific addresses tied to commands or units to send and receive important mail. However, servicemembers' mail is not automatically forwarded from their home addresses. Servicemembers must take the affirmative step of providing these military addresses to any organization from which they expect to receive mail. Even when not deployed to remote areas lacking reliable access to mail, servicemembers may have to travel more frequently – often with little to no notice – and must contend with early deadlines for registration and absentee voting. Although there is federal law meant to provide assistance to absent voters, the law does not ameliorate all of the logistical and residency-based difficulties those voters confront when voting from outside of their districts

Veterans confront further barriers to remaining on voter rolls and exercising the right to vote, including disproportionately high rates of mental health issues such as post-traumatic stress disorder, substance abuse, poverty, and

homelessness. These factors act to further depress the turnout of a population that already experiences unique barriers to accessing the polls.

Ohio's Supplemental Process, operating in conjunction with the obstacles already impeding voters' access to the franchise, creates a near-impenetrable barrier to voting for active duty servicemembers and veterans. By allowing failure to vote for only two years to trigger a Confirmation Notice, the Supplemental Process does not distinguish between lack of voting activity due to ineligibility and lack of voting activity despite continued eligibility – such as missing an election while on deployment. The Supplemental Process disparately obstructs active duty servicemember and veteran voters with mobile lifestyles. Ohio's use of a trigger as broad as the failure to vote to initiate Confirmation Notices will result in the erroneous removal and disenfranchisement of eligible military and veteran voters.

As the text of the National Voter Registration Act ("NVRA") and the Help America Vote Act ("HAVA") make clear, Congress intended to increase engagement in the democratic process. While the laws authorize states to establish mechanisms for maintaining voter rolls, these mechanisms are subject to a strict prohibition on the removal of registrants for merely failing to vote. The legislative histories of the NVRA and HAVA confirm the government's duty to protect the fundamental right to vote from discriminatory voter roll maintenance processes.

ARGUMENT

I. Protecting the Right to Vote is Essential to a Vibrant and Thriving Democracy.

The right to vote "is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533 (1964). This Court has time and again made clear that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[2] The founders of the Republic held a deep, though albeit selective, concern for the protection of meaningful political participation by members of the national family. James Madison held the view that "ordinary citizens lacked the competence to participate directly in their government. Public participation was best limited to electing a governing elite and holding those elected officials accountable in future elections." *See* Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 118 (2012). But, in our continuing search for a more perfect union, we have inexorably expanded the franchise to more and more of our citizens, and, whether it be African-

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[2] *Reynolds*, 377 U.S. at 561-62; *see Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (holding even the most basic rights become illusory once the right to vote has been undermined); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (holding the fundamental constitutional significance of the right to vote is self-evident); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (holding citizens' "fundamental political right to vote" provides a counter against a State's compelling interests for regulating its elections).

Americans, women, or young people, we have removed impediments that stand in the way of meaningful political participation. This is the promise of American democracy.

A. Broad Civic Participation Honors American Ideals and Strengthens the Democratic Process.

The vitality of American democracy depends on all eligible voters participating in the democratic process.[3] The United States was founded on the principles of representative democracy: all Americans should have an equal voice in their government by electing the representatives of their choice.[4] While civic participation at the ballot box was initially limited to white, male property owners,[5] Americans from all walks of life have made incredible strides to redefine the boundaries of the franchise. At historic moments, elected leaders have heard the calls of citizens to enshrine equal voting rights in the law. In response, Congress amended the Constitution to preclude discrimination by race, U.S. CONST. amend. XV, sex, U.S. CONST. amend. XIX, and age, U.S. CONST. amend. XXVI, and created new statutory authority to promote an inclusive democracy through

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[3] *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (holding statutes that grant the franchise to some citizens but deny it to others must show such denials are "necessary to promote a compelling state interest," prioritizing the democratic value of expanding the right to vote rather than limiting it).

[4] *See, e.g.*, *The Federalist No. 10* (James Madison).

[5] *See* Alexander Keyssar, *The Right to Vote: The Contested History of the United States* xxiii (2009).

efficient and equitable access to registration and voting.[6]

Despite the transformative impact of the Voting Rights Act, the NVRA, and HAVA, obstacles to political participation persist. Voter purge programs like Ohio's Supplemental Process lead to widespread disenfranchisement of some of America's most vulnerable citizens. Increasing voter access and participation should be a guiding principle for America's courts and legislative bodies. Ohio has chosen to take a step back in the march toward a robust democracy instead of embracing a principle of inclusion.

When policies impose barriers to the ballot box, the consequences extend beyond election day. Groups that are excluded from voting become systematically underrepresented in policy decision-making.[7] Robust, inclusive voting access produces more effective policy outcomes.[8] In short, voting matters. Equal

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[6] *See, e.g.*, Voting Rights Act of 1965, 52 U.S.C. §§ 10301 *et seq.* (2012) (stating that no law may deny or abridge the right to vote on account of race); National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (2012) (enacted to increase registration, enhance participation, and protect the integrity of elections); Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2012) (directing federal funds to states in order to improve the administration of elections).

[7] *See, e.g.*, John D. Griffin and Brian Newman, *Are Voters Better Represented?*, 67 J.Pol. 1206, 1222 (2005).

[8] *See, e.g.*, William Walter Franko, *The Policy Consequences of Unequal Participation*, 68 (July 2012) (unpublished Ph.D. dissertation, The University of Iowa) (on file with The University of Iowa Libraries) (finding that "[w]ho participates in American politics has consequences for the political process" and that participation "is shown to have a substantial influence on public policy in the states . . . not only

representation requires equal access to the ballot. The process of democratic elections must reflect the promise of democratic ideals.

B. Congress Conferred Jurisdiction to this Court to Enforce the NVRA and HAVA's Protections for Servicemembers' Voting Rights.

Congress enacted the NVRA with the clear purpose to establish procedures that would increase voter registration, "make it possible for Federal, State, and local governments to . . . enhance[] the participation of eligible citizens as voters in elections for Federal office," "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. The legislative history of the NVRA demonstrates that Congress is committed to protecting voting rights for eligible individuals. Congress understood that "to vote is a fundamental right" and that the government's duty is "to promote the exercise of that right." H.R. Rep. No. 103-66, at 1 (1993) (Conf. Rep.). Furthermore, Congress noted that "discriminatory and unfair registration laws and

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when looking at the policies adopted in the states, but also when considering the types of issues that are debated among state lawmakers"); Kim Quaile Hill & Jan E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. OF POL. SCI. 351, 363 (1992) ("Thus, beyond strictly normative concerns about the character of democracy in the United States, we have provided persuasive evidence that participation is critical in the formulation of social welfare policies and that the composition of the electorate determines, at least in part, the nature of such policy.").

procedures can have a direct and damaging effect on voter participation of various groups." *Id.*

Congress's commitment to protecting voting rights for all Americans is particularly clear in its declaration that states cannot remove voters from their rolls due to an eligible voter's failure to vote. 52 U.S.C. § 20507(b)(2). The Congressional record further explains that the NVRA was specifically intended to eliminate the practice of using failure to vote as a basis for purging voter rolls. The Senate Report states that "[o]ne of the purposes of this bill is to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 17 (1993).

Congress passed HAVA following the 2000 presidential election to amend the NVRA provisions regarding voter roll maintenance. There is no evidence that Congress intended for the 2002 amendments to weaken protections for individuals who cannot vote.[9] As with the NVRA, the legislative history of HAVA reveals that Congress intended to protect the rights of both eligible voters who abstain

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[9] *See* H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.) ("The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act (NVRA). The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this Act. Accordingly, H.R. 3295 leaves NVRA intact, and does not undermine it in any way."); *see also id.* (specifying that HAVA has "[n]o effect on other laws" and stipulating "that nothing in the Act...authorizes or requires conduct prohibited by the...National Voter Registration Act of 1993...or may be construed to supersede, restrict, or limit" the NVRA).

from exercising their right to vote and those who face obstacles in exercising that right. For example, in describing computerized list maintenance and the need for states to have systems in place to ensure voter registration records are accurate and updated regularly, the law prescribes that states must have:

> A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993...registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*

H.R. Rep. No. 107-730, at 45 (2002) (Conf. Rep.) (emphasis added).

HAVA also includes specific provisions to ensure active duty servicemembers are able to vote. Congress took measures to ensure that "[t]he bill contains a number of the key provisions . . . which will help remove existing obstacles to absentee voting now confronting members of our armed services and overseas voters." H.R. Rep. No. 107-329, at 42 (2001). Furthermore, the text of the statute directs the U.S. Election Assistance Commission to "conduct a study on the best practices for facilitating voting by absent

uniformed service voters." 52 U.S.C. § 20982. The legislative history of HAVA further confirms Congress's commitment to protecting servicemembers' right to vote:

> Those who serve in our military, and citizens living abroad, face peculiar hardships when attempting to vote. Relatively simple things like applying for and transmitting ballots can become a very difficult and lengthy process for these voters. Steps must be taken to protect the rights of these citizens. Military voters risk their very lives in defense of this country. We must repay them by doing everything possible to see that they are able to vote and have their votes counted.

H.R. Rep. No. 107-329(I), at 41.

In the process of enacting HAVA, Congress understood that active duty servicemembers face unique challenges in exercising their right to vote. *See id.* In accordance with this clear legislative intent, states must create safeguards to ensure that active duty servicemembers have the opportunity to vote and that those votes are counted.

II. Despite Federal Efforts to Increase Participation, Registration and Voting Rates for Active Duty Servicemembers and Military-Connected Students are Alarmingly Low.

As Americans willing to make extraordinary sacrifices for their country, military servicemembers should enjoy unhindered access to voting. Active duty servicemembers and veterans have a unique, personal stake in U.S. policy. Federal spending dictates military salaries and benefits, determining servicemembers' access to health care, higher education, housing, post-service employment, and other benefits for servicemembers and their families.[10] Voting is the primary way by which military members can influence the leadership they serve. And yet, for all of their sacrifices, active duty servicemembers and veterans face significant hurdles when registering to vote, receiving ballots, and casting those ballots.[11]

While guaranteeing the vote for current and former servicemembers is not a new challenge, it is

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[10] *See* U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* (2016); *see also* V. O. Key, Jr., *Southern Politics in State and Nation*, 527 (1949). ("The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote.").

[11] *See, e.g.*, Adam Skaggs, *Registering Military and Overseas Citizens to Vote*, BRENNAN CENTER FOR JUSTICE 13, n. 18 (2009) (describing the challenges faced by military and overseas voters as well as the roadblocks caused by inaccurate voter registration information).

one that demands the country's continued attention.[12] Barriers to the ballot, such as Ohio's Supplemental Process, uniquely bar military servicemembers from participating in the democratic process. Existing federal measures provide insufficient voting assistance to active duty servicemembers and veterans.

A. Voter Participation Among Active Duty Servicemembers is Already Lower than Civilian Participation and Trending Lower.

Evidence indicates that active duty servicemembers both register and vote at lower rates than the citizen voting age population.[13] Alarmingly, registration and voting rates for active duty servicemembers have trended downward while those same rates have remained largely the same for citizens of voting age.[14]

Between the 2012 and 2016 elections, the voter registration rate for active duty servicemembers plummeted from 81% to 68% even as the rate for

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[12] *See* Donald S. Inbody, *Should soldiers' votes get counted? That's not as easy as you'd think*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/11/ensuring-soldiers-a-chance-to-vote-was-a-challenge-in-the-civil-war-it-still-is-today/?utm_term=.12228df7502c ("For most of U.S. history, military personnel have not been able to vote.").

[13] Skaggs, *supra* note 11, at 1.

[14] Nancy Montgomery, *Troops Turned Out in Smaller Numbers for 2016 Presidential Vote*, STARS AND STRIPES (Aug. 22, 2017), http://www.military.com/daily-news/2017/08/22/troops-turned-out-smaller-numbers-2016-presidential-vote.html.

voting age citizens remained steady at 84%.[15] Additionally, the actual voting rate for active duty servicemembers fell from 59% during the 2012 election to just 46% in 2016.[16] At the same time, the voting rate for voting age civilians increased from 74% in 2012 to 75% in 2016.[17]

Such statistical disparities indicate that active duty servicemembers face unique obstacles compared to voting age citizens in exercising their right to vote. Active duty servicemembers acknowledge these obstacles through their own attitudes about the voting process. For example, the Federal Voting Assistance Program's 2014 post-election survey indicates that 67% of active duty servicemembers were not confident that their ballots were even counted.[18]

B. Federal Law Meant to Assist Absent Servicemembers in Voting Neither Alleviates nor Remedies All the Difficulties Such Voters Face.

The disparity between active duty servicemember and civilian voter turnout continues despite Congress's efforts to alleviate existing barriers active duty servicemembers face when attempting to vote. Since 1986, the Uniformed and

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[15] U.S. Dep't of Defense, Federal Voting Assistance Program, 2016 Post-Election Report to Congress, at 9 (2017).

[16] *Id.* at 10

[17] *Id.*

[18] *2014 Post-Election Voting Survey of the Active Duty Military Tabulations of Responses*, DEF. RESEARCH SURVEY AND STATISTICS CTR. 114 (2015) (produced at the request of the Federal Voting Assistance Program).

Overseas Citizens Absentee Voting Act ("UOCAVA") has provided certain servicemember voters with additional assistance in voting during federal elections. 52 U.S.C §§ 20301 – 20311 (Supp. III 2012).[19] In 2009, the UOCAVA was amended by the Uniformed Military Overseas Voters Act, which expanded the practical assistance the UOCAVA provides to covered voters. *Id.*

The UOCAVA covers (1) absent uniformed service voters and (2) overseas voters. The statute defines an "absent uniformed service member" as "a member of a uniformed service [20] *on active duty* who, *by reason of such active duty*, is absent from the place of residence where the member is otherwise qualified to vote." 52 U.S.C. § 20310(1)(A) (emphasis added).

The UOCAVA enables active duty voters to partake in various voter assistance programs. For example, the UOCAVA requires states to accept a Federal Post Card Application for absent active duty voters' registration and absentee ballot applications, 52 U.S.C. § 20302(a)(4), send absentee ballots to absent active duty voters through mail or email, 52 U.S.C. § 20302(a)(6)(c) , and allow absent active duty voters to submit a Federal Write-In Absentee Ballot if their absentee ballots fail to timely arrive, 52 U.S.C. § 20302(a)(3). The UOCAVA's provisions, however, do

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[19] Ohio adopted the UOCAVA program requirements in its state constitution. Ohio Rev. Code Ann. §§ 3511.01–3511.16 (West 2011) (ordering that UOCAVA be incorporated into the constitution).

[20] "Uniformed service" refers to the Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. 52 U.S.C. § 20310(7).

not entirely eliminate barriers to voter access for active duty servicemembers.

C. The UOCAVA is Not Designed to Circumvent Residency-Based Requirements Imposed by Ohio's Supplemental Process.

The UOCAVA applies to active duty voters who are "absent from the place of residence where the [uniformed service] member is *otherwise qualified to vote*." 52 U.S.C. § 20310(1)(A) (emphasis added). In other words, an active duty servicemember must be eligible to vote under Ohio's voter eligibility rules to submit a UOCAVA ballot, regardless of his or her out-of-state location at the time of the election. Therefore, the UOCAVA does not alleviate all the voting barriers imposed by the Supplemental Process.

Depending on an individual servicemember's assignment, it is reasonable to expect he or she might be away from their Ohio residence for more than the two years necessary to trigger the Confirmation Notice. However, the fact that these active duty voters are absent from their Ohio residences makes it less likely they will receive the Confirmation Notice, which they must respond to in order to remain on Ohio's voter rolls. At the very least, Ohio imposes an additional burden on the active duty voter, or on his or her family, by requiring that news of the Confirmation Notice is somehow forwarded to the active duty servicemember. Otherwise, the active duty voter serving his or her country far from home will remain ignorant of the Notice that prompted the process of his or her removal from the voter rolls.

1. The Decrease in the National Rate of Return and the Number of Absentee UOCAVA Ballots Indicate that the UOCAVA's Voter Assistance Programs Do Not Address All Barriers to Military Servicemembers' Voting.

Although the UOCAVA requires states to extend accommodations to active duty servicemembers, these accommodations cannot ensure absent ballots will be counted. The Ohio Secretary of State was dissatisfied with Ohio's 80.8% return rate for active duty and overseas voters' absentee ballots in the 2008 election because it suggested "a large number of Ohio UOCAVA citizens are not participating in the electoral process [] and those who are attempting to participate are experiencing an unacceptably high non-return rate."[21] However, in the 2016 election, only 68.1% of UOCAVA ballots were counted nationally.[22] Although the total number of UOCAVA ballots submitted, but not necessarily counted, was similar in the 2012 and 2016 federal elections, the number of UOCAVA

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[21] Office of the Ohio Secretary of State, *Bridging the Gap: Simplifying the process for UOCAVA voters through innovative technology and data collection* 3 (2013), https://www.fvap.gov/uploads/FVAP/Grants/Ohio_application.pdf (produced at the request of the Federal Voting Assistance Program).

[22] U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey 2016 Comprehensive Report: A Report to the 115th Congress* 11-12 (2016), https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

ballots submitted by uniformed service members decreased by approximately 84,000 ballots in the 2016 election.[23] The number of UOCAVA ballots submitted by overseas civilians, however, increased by approximately 90,000 ballots.[24]

The decrease in the total number of UOCAVA ballots counted nationally, as well as the decrease in the number of absent active duty voters submitting ballots, indicates that the UOCAVA's methods of assistance do not overcome other barriers to voting.

2. The Logistical Difficulties of Receiving and Submitting UOCAVA Ballots Negate the Assistance the UOCAVA Provides to Active Duty Voters.

The nature of active duty voters serving away from their Ohio residences complicates their ability to comply with the UOCAVA's logistical requirements. Although the UOCAVA requires states to send materials through a voter's preferred method, 52 U.S.C. § 20302(a)(6)(C), an active duty voter must have access to mail or Internet to request and receive a ballot. Further, regardless of the method through which the states send the absentee ballot, the active

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[23] *Id.*

[24] *Id.*

duty voter must mail a hard copy of the ballot back to Ohio.[25]

If an active duty voter is serving somewhere remote without reliable access to the Internet, printers, or local mail, it is functionally impossible for him or her to submit a ballot for counting. For active duty voters with more consistent access to mail and the Internet, the onus is still on the servicemember to update his or her mailing and email addresses with the state every time his or her deployment location changes. When an active duty voter is preparing for deployment, it is understandable that he or she may not think to send the Ohio Board of Elections his or her new contact information to ensure a ballot is mailed to the correct place. Regardless of the assistance the UOCAVA's provisions purport to provide, absent active duty voters are confronted with real barriers to exercising their political enfranchisement while serving their country.

D. Federal Law Meant to Assist Absent Servicemembers in Voting Cannot Overcome All of the Barriers Ohio's Supplemental Process Imposes on Military-Connected Student Voters.

Although some military-connected students receive absentee assistance to alleviate some of the

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[25] *See* 52 U.S.C. § 20303(b) (providing that ballots must be submitted in accordance with State rules); Ohio Rev. Code Ann. § 3511.021(4) (prohibiting the submission of ballots electronically).

burden on their right to vote, most of them, subject to the same concerns that prompted the UOCAVA, have their transient residency problems compounded because they are ineligible for the UOCAVA's voter assistance programs.

1. There is Currently a Significant Increase in the Number of Military-Connected Students Enrolling in Higher Education During or After Their Military Service.

Military-connected students are attending schools across the country as part of the largest influx of veteran college enrollment since post-World War II.[26] The U.S. Department of Defense reports that after the Post-9/11 GI Bill was enacted in 2009, military-connected student enrollment increased by 35,000 to over 500,000.[27] Estimates indicate that by 2012, military-connected student enrollment was up to 900,000.[28] The U.S. Department of Veterans Affairs ("VA") reports approximately 1.1 million veterans used educational benefits between 2000 and 2013.[29]

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[26] Sue Doe & Lisa Langstraat, *Generation Vet: Composition, Student Veterans, and the Post-9/11 University* 1–2 (2014).

[27] *Id.*

[28] *Id.*

[29] U.S. Dep't of Veterans Affairs, *Department of Veterans Affairs Education Program Beneficiaries: FY 2000 to FY 2013*, NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS (2017), https://www.va.gov/vetdata/Utilization.asp.

In Ohio, approximately 27,000 student veterans relied on VA educational benefits from 2000 to 2013.[30]

Accounting for this influx of military-connected students, the legislative and executive branches have taken significant steps to provide these students with financial and other assistance. *See* 38 U.S.C. § 3313 (2017). For example, the GI Bill requires schools to charge in-state tuition and fees to eligible military-connected students residing in the state in which the school is located. 38 U.S.C. § 3313(c)(1)(A)(i). In August, Congress passed and the President signed into law the Harry W. Colmery Veterans Educational Assistance Act of 2017, which provided military-connected students with additional housing benefits contingent upon their education. Pub .L. No. 115-48, 131 Stat. 973 (Aug. 16, 2017). The recent enactment of a law implementing further protections for military-connected students' residency demonstrates that, despite the uncertainty surrounding student residency and voter access,[31] consensus exists across political parties and branches that military-connected students should be guaranteed a full range of GI Bill benefits.

Generally, the GI Bill ties its financial benefits to the residence of military-connected students during their enrollment. *See* 38 U.S.C. § 3318. Because many student veterans rely on the GI Bill's financial

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[30] *Id.*

[31] Controversy surrounding the policies regarding how military-connected students' changing residences should affect their access to or ability to vote began shortly after the flood of student veterans enrolled in college after World War II. *See, e.g., Dunn* at 345–49, *Robbins v. Chamberlain*, 297 75 NE. 2d 617 (1947).

assistance to afford tuition and living expenses, they should not be penalized for changing their residence to retain these benefits. Unfortunately, the military-connected students who move to their schools to attain the financial means to study risk losing the ability to vote in the state where they are already registered to vote.

2. Protections for Military-Connected Student Voters are Severely Inadequate to Overcome Barriers to Voting.

Servicemembers in the National Guard and Reserves, although still subject to deployments on short notice, are unfortunately not covered by the UOCAVA. *See* 52 U.S.C. § 20310. Most military-connected students, however, transfer to the National Guard or Reserves to pursue their education.[32] Therefore, these military-connected students are largely left with the same voter protection as the general collegiate student body.

Where non-military-connected students are "particularly mobile,"[33] military-connected students

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[32] *See* Dani Molina & Andrew Morse, *Military-Connected Undergraduates: Exploring Differences Between National Guard, Reserve, Active Duty, and Veterans in Higher Education*, THE AM. COUNCIL ON EDUC. 5 (Nov. 2015), http://www.acenet.edu/news-room/Documents/Military-Connected-Undergraduates.pdf.

[33] Yael Bromberg et al., *Tuning In & Turning Out: Millennials are active but not voting; what's stopping them and*

often endure an even more transient educational experience. Military-connected students are subject to deployment on short notice due to the nature of their active duty or reserve status.[34] Further, military-connected students confront the general challenge of transitioning from the military into civilian student life.[35]

Military-connected students, therefore, are faced with compounding barriers to voting: they are part of a young demographic already less likely to vote, they are balancing military service with a desire to succeed in school, and their residencies are in flux. Ohio's Supplemental Process imposes an additional and inappropriate barrier on military-connected student voters' ability to vote.

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how can we make their voices count?, COMMON CAUSE 8 (2016), http://www.commoncause.org/research-reports/tuning-in.pdf.

[34] *See* Corey B. Rumann & Florence A. Hamrick, *Student Veterans in Transition: Re-enrolling after War Zone Deployments*, 81, 4 J. OF HIGHER EDUC. 431 (July/Aug. 2010) https://muse.jhu.edu/article/388554/pdf (stating that National Guard and Reserve units "often face problems associated with mid-semester academic withdrawals.").

[35] *See infra* Section IV; *see also* Jon Marcus, *Community Colleges Rarely Graduate the Veterans They Recruit*, THE ATLANTIC (Apr. 21, 2017), https://www.theatlantic.com/education/archive/2017/04/why-is-the-student-veteran-graduation-rate-so-low/523779/.

III. Ohio's Supplemental Process Will Exacerbate the Difficulties Servicemembers Face in Voting.

Under the NVRA, Congress requires states to conduct a general program that makes a reasonable effort to remove the names of ineligible voters because of the registrant's death or change in residence. 52 U.S.C. § 20507(a)(4). The NVRA clearly specifies that a state's list-maintenance program "shall not result in the removal of the name of any person by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2), (c)(1). Ohio's voter roll maintenance program does just that.

The stated purpose of Ohio's Supplemental Process is to "identify electors whose *lack of voter activity* indicates they may have moved."[36] However, the Supplemental Process captures any lack of voter activity regardless of whether the voter has actually moved. This broad criterion for triggering Confirmation Notices disparately harms active duty servicemembers and veterans, who may miss an election because of a temporary deployment rather than a permanent out-of-state move.

Ohio has two procedures to remove voters whom it considers ineligible from its rolls.[37] First, the State relies on change-of-address notices filed with the United States Postal Service to alert it that notice must be sent so that the registrant may confirm the address change.[38] The second procedure, at issue here, is Ohio's Supplemental Process, through which

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[36] Ex. G to Defs. 1st. (emphasis added).

[37] Pet. App. 43a.

[38] *Id.* at 4a, 44a-45a.

the State sends Confirmation Notices to any registrants who have not voted for two years.[39] If a registrant does not respond to the Notice and fails to vote for an additional four years, the registrant is removed from Ohio's voter rolls.[40] As the Sixth Circuit found, the Supplemental Process would violate the NVRA because removal of the voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016) (quoting *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002)). Not only does this process contravene the NVRA's clear prohibition that voters may not be removed for failure to vote, but it does so to the great disadvantage of current and former servicemembers whose unique circumstances already make it difficult for them to register and vote – even when they want to.

A. Prior to Their Removal from Voter Rolls Through the Supplemental Process, Servicemember Voters Face Significant Obstacles Which Ohio Must Mitigate, Not Aggravate.

Active duty servicemembers and veterans receive a Fleet Post Office ("FPO") or Army Post Office ("APO") mailing address[41] during their time in the service. Although mail sent to FPO/APO addresses

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[39] *Id.* at 5a, 46a.

[40] *Id.* at 5a, 57a.

[41] *Shipping via Military Mail [APO, FPO, DPO]*, GOVX (2016), https://support.govx.com/hc/en-us/articles/226407608-Shipping-via-Military-Mail-APO-FPO-DPO-.

remains accessible in many circumstances, servicemembers receive only mail sent directly to their FPO/APO addresses. Mail sent to a previous home address is not forwarded unless the servicemember has someone to regularly check and manually forward his or her mail. Servicemembers must constantly update FPO/APO addresses in order to continue receiving mail.[42]

Eighteen to twenty-four-year-olds and people without college degrees – the majority of military servicemembers – are already less likely to vote.[43] That demographics' disengagement is exacerbated by the unique challenges servicemembers face in casting ballots and receiving essential administrative notices.[44] Furthermore, these young enlistees may or may not have voted in previous elections, and may not know to provide their military addresses to the Board of Elections in order to receive election-related notices.[45] Servicemembers also may need to travel or move frequently and with short notice, further inhibiting consistent access to mail.[46]

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[42] U.S. Army, *Army Postal Services* (Oct. 2015).

[43] Bromberg et al., *supra* note 33, at 5.

[44] *Id.*

[45] *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, REUTERS (June 2, 2016), www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D; *see also* David Thackham, *DOJ wants to know how S.C. purges voters. Here's what the state will say*, THE HERALD (July 2015), http://www.islandpacket.com/news/politics-government/election/article161683808.html.

[46] Bromberg et al., *supra* note 19, at 9.

B. Existing Military Voter Support Cannot Mitigate Further Barriers Created by the Supplemental Process.

Each command has a designated voting representative whose duties include providing resources and helping servicemembers register to vote and cast ballots. However these representatives are officers who have separate primary duties. Voter aid as merely a collateral duty.[47] As such, the effectiveness of the voting representative may depend largely on individual officers' engagement with helping the servicemembers in his or her command vote.

Servicemember registration and voter participation have seen significant decreases in recent years despite the UOCAVA's assistance programs.[48] Active duty servicemembers – 71% of whom are ages eighteen to twenty-four – are routinely deployed, often on very short notice.[49] For those sent

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[47] *See, e.g.*, U.S. Navy, *Voting Assistance Officers*, Commander, Navy Installation Command (2017), https://www.cnic.navy.mil/ffr/fleet_readiness/special_interest_programs/navy_voting_assistance_program/voting-assistance-officers.html.

[48] *See supra* Section II.A.-II.B.; *see also* R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 FORDHAM URB. L.J. 935, 966 (2007) ("As with previous military voting laws, some discretion is still left to the states under UOCAVA, and variations in registration requirements, deadlines for submitting ballots, and tight time frames between when ballots are sent to military voters and when they are due to be returned still cause problems.").

[49] *See* Bromberg et al., *supra* note 33, at 5.

to combat zones, there are understandably higher priorities than registering and voting, even when the desire is there to do so.[50] Ohio's Supplemental Process creates an additional hurdle. If an active duty servicemember deployed in a combat zone fails to register or vote for two years, he or she becomes subject to the Supplemental Process. Where he or she fails to respond to the Notice and does not vote for an additional four years because of the array of obstacles that active duty servicemembers face in reentering society, they are removed from Ohio's voter rolls. These burdens persist once active duty servicemembers leave the service and transition to veteran status.

IV. Like Active Duty Servicemembers and Military-Connected Students, Veterans are Vulnerable to Measures Hindering Their Ability to Vote.

Available transition assistance programs for outgoing servicemembers may involve certain required informational sessions on relocation assistance, transitional healthcare, job search resources, and financial coaching However, taking part in such programs is optional.[51] Unfortunately, many veterans suffering from service-related trauma remain untreated.[52]

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[50] *Id.*

[51] *Transition Assistance Program Overview*, MILITARY.COM (Sept. 2017) http://www.military.com/military-transition/transition-assistance-program-overview.html.

[52] *Study explores reasons why Veterans seek – or don't seek – PTSD care*, DEP'T OF VETERANS AFFAIRS (Apr. 24, 2014),

Veterans face several difficulties in transitioning to civilian life, including a high likelihood of experiencing post-traumatic stress disorder or homelessness, as well as high rates of disability[53] and substance abuse,[54] which can lead to criminal charges and disenfranchisement. Ten percent of people experiencing homelessness in the U.S. are veterans, and 75% of homeless veterans deal with mental health issues, substance abuse issues, or both.[55] Roughly 20% of veterans participating in substance abuse treatment are homeless.[56] According to 2014 U.S. Department of Housing and Urban Development data, 8.6% of Ohio's veterans are unemployed and roughly 1,183 are homeless.[57]

Veterans have an increased likelihood of experiencing homelessness and poverty based on their low rates of employment. In August 2015, only

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https://www.research.va.gov/currents/spring2014/spring2014-25.cfm.

[53] *What do we do with the staggering number of Disabled Veterans?*, NAT'L VETERANS FOUND. (Oct. 23, 2015), https://nvf.org/staggering-number-of-disabled-veterans/ (reporting that roughly 45% of veterans from Iraq and Afghanistan filed disability claims).

[54] *What Statistics Show About Veteran Substance Abuse and Why Proper Treatment is Important*, NAT'L VETERANS FOUND. (Mar. 30, 2016), https://nvf.org/veteran-substance-abuse-statistics/.

[55] *Critical Issues Facing Veterans and Military Families*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Jan. 20, 2017), https://www.samhsa.gov/veterans-military-families/critical-issues.

[56] *Id.*

[57] Housing Assistance Council, *Supporting Veterans in Ohio*, VETERANS DATA CENT (last visited Sept. 20, 2017), http://veteransdata.info/states/2390000/OHIO.pdf.

49% of veterans without a service-connected disability were employed, and only 43.3%, of veterans with a service-related disability were employed.[58] Low-income and homeless people consistently vote less than people in higher income brackets,[59] in part because of the many barriers that poverty and homelessness create for participation in the electoral process, including lack of identification or proof of address, limited ability to take time off from work to vote, or lack of access to transportation.[60] In 2014, Ohio drastically decreased its early voting hours, creating additional challenges for several demographics that frequently intersect with the veteran population. [61]

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[58] Bureau of Labor Statistics, *43.3 percent of veterans with a service-connected disability were employed in August 2015* (Nov. 10, 2016), https://www.bls.gov/opub/ted/2016/43-point-3-percent-of-veterans-with-a-service-connected-disability-were-employed-in-august-2015.htm.

[59] Sean McElwee, *The Income Gap at the Polls*, POLITICO (Jan. 7, 2015), http://www.politico.com/magazine/story/2015/01/income-gap-at-the-polls-113997.

[60] Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, THE ATLANTIC (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.

[61] Ellen Brait, *Voting Restrictions in the U.S. Since the Election: State by State*, THE GUARDIAN (Jul. 13, 2015), https://www.theguardian.com/us-news/2015/jul/13/voting-restrictions-2010-election. (although a couple of early voting days were restored – that settlement also eliminated the "golden week" that allowed same-day registration) (internal quotations and citations omitted).

While states can no longer require a "traditional dwelling" for voter registration,[62] veterans experiencing homelessness still encounter difficulties, namely satisfying durational residency and proof of identity or address requirements.[63] While a homeless person can list a shelter or general residential vicinity on registration forms, that type of address makes it less likely that the Notices will reach the intended recipient.[64]

V. This Court Has Historically Intervened to Protect the Fundamental Right to Vote for Military Servicemembers.

In a particularly cruel irony, Ohio's Supplemental Process imposes greater burdens on the very people who dedicate their lives to defending American democracy by obstructing their participation in the democratic system.

This Court has a tradition of protecting military servicemembers' right to vote against state-

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[62] *Voter Rights/Registration Packet 2010*, NAT'L COAL. FOR THE HOMELESS 8 (2010), http://nationalhomeless.org/projects/vote/Manual_2010.pdf.

[63] *Id.*; Patrick Marion Bradley, *The Invisibles: The cruel Catch-22 of being poor with no ID*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582_story.html?utm_term=.c1cab0e27a41.

[64] Amy L. Freeman, *How Do You Register to Vote if You're Homeless?*, HUFFINGTON POST (Aug. 26, 2014), http://www.huffingtonpost.com/amy-l-freeman/voting-and-homeless_b_5533134.html.

imposed barriers. In a striking example of this Court's tendency – and obligation – to intervene on behalf of voters' rights, it struck down a state law excluding active duty servicemembers from voting in state and local elections in *Carrington v. Rash*, 380 U.S. 89 (1965). The Court found that such a classification violated the Equal Protection Clause, recognizing that "the uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it." *Id.* at 97 (alteration in original). Just as the Court in *Carrington* recognized that servicemembers are a population subject to unjust disenfranchisement, so too should this Court intervene to uphold the rights of those servicemembers unfairly burdened by Ohio's Supplemental Process.

Recently, in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2257 (2013), the Court read the NVRA's requirement to "accept and use" the Federal Form for voter registration to bar states from requiring documentary proof of citizenship in addition to regular Federal Form submissions. The Court explained that if states were allowed to require such additional documentation, the Federal Form would "cease[] to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office,'" one of the statute's most important stated purposes. *Id.* at 2256 (second alteration in original) (quoting 52 U.S.C. § 20501(b)(1)). The Court protected vulnerable voters whom Arizona had disenfranchised by imposing an invalid interpretation of the NVRA and failing to heed the NVRA's purpose of allowing eligible voters to maintain their eligibility.

The Court should similarly intervene now to protect vulnerable voters from the additional barriers Ohio's Supplemental Process imposes on their ability to vote.

CONCLUSION

For the foregoing reasons, the Sixth Circuit's judgment that Ohio's Supplemental Process violates the NVRA's prohibition on removing registrants for lack of voter activity should be affirmed.

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